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Supreme Court, U.S.
FILED

No. 02 189 AUG 1 2002

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In the Supreme Court of the United States

MITSUBISHI HEAVY INDUSTRIES, LTD.
Petitioner

versus

ANGELINA CANTUBA, et al.
Respondents

On Petition for a Writ of Certiorari To the Supreme Court of the State of Louisiana and to the Court of Appeal, Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

On January 1, 1994, the MARIKA - a foreign flag vessel loaded in Canada with 140,000 tons of ore and crewed by Filipino and Greek nationals - sank on the High Seas off Canada. Petitioner Mitsubishi Heavy Industries, Ltd. ("MHI") a Japanese corporation constructed and delivered in 1973 the vessel then known as the GARDEN GREEN to a different shipowner. The vessel never traded in Louisiana or even in the United States. All plaintiffs are residents of Greece or the Philippines and the witnesses are in Canada, Japan, Greece and the Philippines. The wreck lies on the bottom of the North Atlantic Ocean. Here, the plaintiffs selected a Louisiana state court and requested a jury trial.

1. Whether the decision of the Louisiana Supreme Court, denying a review of the decision of the Louisiana Appeals Court for the Fourth Circuit which reversed the Louisiana trial court's dismissal of the case for *forum non conveniens,* is erroneous and is repugnant to *forum non conveniens* principles articulated by this Court and adopted as the binding public policy of the State of Louisiana by an amendment to the Louisiana Code of Civil Procedure Article 123(B) which empowers a Louisiana state court to dismiss a case for *forum non conveniens* in which a maritime cause of action is predicated upon acts or omissions originating outside Louisiana. The 1999 Legislation eliminating the prohibition of the *forum non conveniens* defense in maritime cases was declared to be remedial, curative and procedural legislation and enforceable retroactively as well as prospectively.

LISTING OF ALL PARTIES TO THIS PROCEEDING

The parties to these proceedings below were:

Petitioner Mitsubishi Heavy Industries, Ltd. and the following Respondents who were allegedly the survivors of the various deceased crew members from the M/V MARI-KA: Angelina Cantuba, Arceli Macarilay, Jamie Marmol, Floro Besada, Sr., Catalina H. Tarrosa, Augustina Galvan, Federico Bazarte, Dolores Encinarez, Norma Tija Salas, Victorino R. Maratas, Merlyn S. Sorilla, Elizabeth S. Saberon, Veronica Segundo, Zosima G. Fabila, Natividad F. Calinawan, Lorna Maningo, Ekaterini loannides, Kosmas Theocharis, Asimenia Triantafyllos, Katina Tzemos, Efthalia Banos, Nashier Ismael, Leodeganio C. Ardina, Crispin Talabong, Mercedes Delgado, Marivic R. Silva, Johnathan Dean and Adelina Casinillo.

Additionally, the Plaintiff/Respondents named the following as defendants: the American Bureau of Shipping, Ltd., the Salvage Association, Ltd. and its retired employee, Mr. Paul Francis Daniels.

CORPORATE DISCLOSURE STATEMENT

Corporate Disclosure Statement and Listing of Parent and Subsidiary Companies in Accordance with Supreme Court Rule 29.6:

Mitsubishi Heavy Industries, Ltd. has no parent corporation. There is no publicly held company owning 10% or more of Mitsubishi Heavy Industries, Ltd.'s stock.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES TO REVIEW THE REFUSAL OF THE LOUISIANA SUPREME COURT TO GRANT A CERTIORARI REVIEW AND TO REVERSE AN ERRONEOUS AND UNCONSTITUTIONAL DECISION BY THE LOUISIANA FOURTH CIRCUIT COURT OF APPEAL WHICH DEPRIVED PETITIONER OF DUE PROCESS OF LAW UNDER THE U. S. CONSTITUTION

MHI respectfully petitions for a writ of certiorari for the following, to wit:

CITATIONS TO OPINION BELOW

The opinion from the Civil District Court for the Parish of Orleans dismissing all suits is not reported but a copy of the judgment, stipulation, and transcript of oral argument from the trial court is reproduced herein in Appendix A-1.

The opinion of the Louisiana Court of Appeals for the Fourth Circuit is published as *Cantuba v. American Bureau of Shipping,* 811 So.2d 50 (La. Ct. App. 4th Cir. 2002), and is reproduced herein in Appendix B-1.

MHI filed a Petition for Writ of Certiorari to the Supreme Court for the State of Louisiana which was denied on May 10, 2002. This order is published at 815 So.2d 846 and is reproduced herein in Appendix C-1.

JURISDICTION

The judgment of the Supreme Court of the State of Louisiana was entered on May 10, 2002. (Appendix C-1.) The jurisdiction of this Court is invoked under 28 U.S.C.

§ 1257(a) and under 28 U.S.C. § 2101(c).

CONSTITUTIONAL STATUTORY PROVISIONS INVOLVED

Louisiana Code of Civil Procedure Article 123 is reproduced herein in Appendix D-1. Historical notes reflect that previously Louisiana law provided that in seaman's cases and federal maritime law cases the doctrine of *forum non conveniens* could not be urged as a defense. However for valid reasons in 1999 the Louisiana Legislature specifically deleted those provisions and permitted the defense of *forum non conveniens* as public policy law of Louisiana. Historical comments are reproduced in Appendix D.

The United States Constitution provides at Amendment V that no person shall be deprived of life, liberty or property without due process of law and at Section 1 of Amendment XIV that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The United States Constitution does not require the United States, as a condition of applying its laws to its own citizens and residents, to be courthouse or lawmaker to the world. *Vaz Borralho v. Keydril Co.* 696 So.2d 379, 385 (5th Cir. 1983).

STATEMENT OF THE CASE

The MARIKA a 967 foot bulk carrier was loaded in Canada with 140,000 tons of ore and sank in the North Atlantic Ocean on January 1, 1994 during a fierce storm. The

MARIKA was a Liberian flag vessel on a voyage from Canada to Ijmuniden. All aboard were lost. The vessel was built in Japan by MHI and was delivered in Japan to its first owner on July 18, 1973. MHI did not have any contact with the vessel since that time. The vessel never traded with U. S. ports and never sailed in Louisiana waters. It was loaded with ore in Canada by Iron Ore Co. a Canadian stevedore who was immune from suit in Louisiana. *Cantuba v. American Bureau of Shipping,* 709 So.2d 263 (La. Ct. App. 4th Cir. 1998).

An investigation by Liberian and Canadian authorities was unable to reach any conclusion as to why the vessel sank. Both stated it would be rank speculation to assign a cause for the sinking. Despite the lack of any connection to Louisiana – except the residence of plaintiffs' attorneys – plaintiffs filed their wrongful death cases in Louisiana state courts seeking a jury at a time when Louisiana law did not permit a defendant in a maritime case to urge the defense of *forum non conveniens.* The Louisiana Legislature, seeking to cure this erroneous result, adopted a public policy amendment in 1999 to permit this defense *in maritime* cases, The district court applying the 1999 amendment to La. C.C.P. art. 123(B) dismissed all claims based on *forum non conveniens* and determined that the courts of Greece, the Philippines, Canada and Japan were available. (Appendix A-1.) All defendants then filed the stipulation required by C.C.P. art. 123(C) agreeing to waive any defense of prescription and to allow depositions taken in this case to be used in any other forum. (Appendix A- 4.) A three-judge panel of the Louisiana state appeals court erroneously reversed the trial court. (Appendix B-1.) The Louisiana Supreme Court denied certiorari. (Appendix C-1.)

In 1995 some of the same Greek plaintiffs sued in New York under the Death on the High Seas Act and general maritime law. In *Ioannides v. Marika Maritime Corp.,* 928

F.Supp. 374 (S.D.N.Y. 1996), excerpt attached in Appendix E-1, the federal court dismissed that suit based on *forum non conveniens,* noting the vessel was last repaired in Piraeus, Greece and concluding that the bulk of the evidence and the witnesses were in Greece. "There seems little justification for opening the courts of the United States – which are paid for by U. S. taxpayers and whose juries are composed of U. S. citizens asked to drop their everyday activities to serve - to claims in these circumstances even if as plaintiffs stoutly argue, the ultimate base of operations of the vessel in question was the United States." 928 F.Supp. at 380. Suit was then filed in both Greece and New Orleans.

The American Bureau of Shipping filed a third party demand against the Canadian loading stevedore, Iron Ore Co. Another Louisiana Fourth Circuit Appeals panel held that Iron Ore – operating primarily in Canada – lacked sufficient contacts in Louisiana to be joined as a party to this case. *Cantuba v. American Bureau of Shipping,* 709 So.2d 263 (La. Ct. App. 4th Cir. 1998).

MHI sought dismissal of this case on the same grounds as the New York case *i.e.* a motion to dismiss for *forum non conveniens* and also objected to venue and pleaded *forum non conveniens* as a defense throughout. (Appendices F, G and H.) Plaintiffs opposed on the ground that article 123 of the Louisiana Code of Civil Procedure as then enacted specifically prohibited applying *forum non conveniens* to cases brought under the general maritime law. The trial court relying on *American Dredging Co. v. Miller,* 510 U.S. 443, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994), where this Court held that "[T]he doctrine [of *forum non conveniens*] *is* one of procedure rather than substance ....." *American Dredging,* 510 U.S. at 453, 114 S.Ct. at 988, 127 L.Ed.2d at 297, denied MHI's motion on February 25, 1997. (Appendix J-1.) Previously, on February 1, 1996 (Appendix I-1) the trial

court overruled MHI's exceptions of improper service, improper venue, no cause of action, and lack of personal jurisdiction.

Thereafter the Louisiana Legislature intervened and expressed a different public policy for Louisiana and deleted the special exception in maritime cases by amending Louisiana Code of Civil Procedure Article 123 effective June 30, 1999. All such cases in state court are subject to the same *forum non conveniens* criteria as any other case.

As a procedural rule the Legislature decreed under Louisiana public policy that the amendment should be retroactively applied and stated: **"This Act is declared to be remedial, curative, and procedural and therefore is to be applied retroactively as well as prospectively."** (Appendix D-2.)

MHI - frustrated by plaintiffs' persistent refusal to appear and be deposed in their selected forum (New Orleans) since 1996 even though plaintiffs were ordered by the court to appear – then refiled its motion to dismiss for *forum non conveniens.* All defendants filed a stipulation as required by article 123(C) agreeing to waive any defense of prescription should the case be filed in a more convenient forum and to allow depositions taken in this case to be used in the new case provided the new case were filed within an appropriate time period. (Appendix A-4.)

The trial court granted MHI's motion commenting: **"I guess if I've seen a case that needs to be transferred it's this one. And I guess that was my thought since I've had the case and the motion had been denied [by Judge DiRosa], so I'm going to grant the Motion to Dismiss."** (Appendix A-19.) (emphasis added.) The trial judge signed a detailed judgment explaining her reasons:

> ... the Court finds that the claims brought by the plaintiffs are predicated upon acts and/or omissions originating outside of the territorial boundaries of this state and, considering the fact that the alleged acts giving rise to this action occurred outside of the state and that almost all of the witnesses and parties except for one are located outside of the state and outside of the United States, the Court finds that, in the interest of justice, this suit should be dismissed, without prejudice, on the basis of *forum non conveniens* since this forum is an inconvenient and inappropriate forum. The Court further finds that Greece, The Philippines, Canada or Japan would be convenient and appropriate for this case in view of the location of the parties and witnesses.

(Appendix A-2.)

On appeal, a three-judge panel of Louisiana's court of appeals reversed the trial court's decision. (Appendix B.) Contrary to plaintiffs' claims of delay by defendants, plaintiffs repeatedly engaged in stall tactics in an effort to frustrate the defendants' request to obtain answers to simple interrogatories and requests for production of documents directed to each plaintiff. This necessitated repeated motion practice, which resulted in numerous court orders being entered against the plaintiffs. MHI was awarded sanctions against the plaintiffs for their failure to comply with the discovery orders. The efforts of MHI and details concerning the plaintiffs discovery deficiencies are set out in the history appearing in the record and excerpt thereof is attached as Appendix K. Plaintiffs refuse to appear in Louisiana for depositions or to fully respond to court ordered discovery.

Six years after the cases were filed no plaintiffs have yet appeared to testify in deposition. Only six depositions of

others have been taken - the last deposition on December 17, 1996. **MHI identified 49 possible parties or witnesses located throughout the world that might be required in the litigation.**

Not one plaintiff has served complete written responses to interrogatories or requests for production, far less appeared for deposition. Neither the owners, operators of the vessel or the loading stevedores have been deposed.

Between the period of June 30, 1999 to November 2, 2000, the following occurred:

(1) MHI filed two motions for extension of time to respond to plaintiffs' discovery which were necessary because the information was located in Japan. The court order granting same expressly states "with a full reservation of all rights, objections and defenses of MHI."

(2) On November 2, 1999 MHI filed a notice of deposition of five plaintiffs to be taken in New Orleans on February 15-17, 2000.

(3) On November 3, 1999 plaintiffs filed a notice of deposition for use at trial of six plaintiffs to be taken in the Philippines on February 10- 11, 2000.

(4) On January 25, 2000 the plaintiffs filed a motion to quash the depositions of the plaintiffs which had been noticed by MHI for New Orleans. In their memorandum, the plaintiffs specifically state that they informed MHI's counsel that **"the depositions were inconvenient"** and that they "would impose exorbi-

tant burden and expense upon the personal representatives who are primarily the widows of the deceased seamen." **Plaintiffs now agree that this is an inconvenient forum.**

(5) On February 4, 2000 the lower court held a hearing on the motion to quash.[1] During the argument, counsel for plaintiffs admitted that the relevant witnesses were in Greece and the Philippines and expenses and convenience of travel was burdensome for the plaintiffs and costs with coming to Louisiana would "eat up a large portion of recovery. "[2] The plaintiffs proposed a trip to Greece and the Philippines.

(6) Judge Ramsey denied plaintiffs' motion to quash from the bench stating: **"I recognize the expense in that the plaintiffs may have to travel to New Orleans twice, but they chose this forum. I think they're [the defendants] entitled to have their depositions."** [3]

(7) On May 11, 2000 the plaintiffs filed a petition for letters rogatory for document production from Iron Ore Co. of Canada previously held by this Court not to be held subject to personal jurisdiction in Louisiana.[4]

(8) On November 2, 2000 MHI filed a motion to dismiss for an inconvenient forum since the plaintiffs still refused to come to New Orleans for depositions. A

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1 Cantuba record, vol. IX, p.1 *et seq.*

2 *Id.* at pp.3-4.

3 *Id.* at p. 9.

4 Cantuba record, vol.. VII, p. 1580.

> hearing was scheduled for November 17, 2000.[5] After two continuances this motion was granted by Judge Ramsey on December 8, 2000.

The record during this period does not reflect any activity on the part of the plaintiffs' lawyers in exercising diligence to prosecute their claims. They took no depositions during the time. Plaintiffs' conduct illustrates the ultimate in discovery avoidance: **The plaintiffs refused to come to Louisiana to give depositions despite being ordered by Judge Ramsey.** Plaintiffs' activities during this period brought home the point that Civil District Court is an inconvenient forum and they did not expend efforts to move the case forward.

REASONS FOR GRANTING THE PETITION

Mobile Oil Corp. v. Higginbotham, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed. 2d 581 (1978), and *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317,112 L.Ed. 2d 275 (1990), indicate that no court can interpose its own rules once a legislative body specifically enters the area. Justice O'Connor writing for the Court in *Miles v. Apex Marine* Corp. stated:

> These statutes established an unanmbiguous policy in abrogation of those principles that underlay *The Harrisburg.* Such a policy is "to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law." M*oragne, supra,* at 391, 90 S.Ct., at 1782. Admiralty is not created in a vacuum; legislation has always served as an important source of both common law and admiralty principles. [citations

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5 Cantuba record, vol. V11, p. 1596.

> omitted.] The unanimous legislative judgment behind the Jones Act, DOSHA, and the many state statutes created a strong presumption in favor of a general maritime wrongful death action.
>
> But legislation sends other signals to which an admiralty court must attend. "The legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect." *Moragne, supra,* at 392, 90 S.Ct., at 1783. **Congress, in the exercise of its legislative powers, is free to say "this much and no more." An admiralty court is not free to go beyond those limits.**

498 U.S. at 24, 111 S.Ct. at 321, 112 L.Ed. 2d at 285. (emphasis added.)

MHI has been denied due process by the decisions of the Louisiana Supreme Court and the Fourth Circuit which decisions completely undermine and subvert the important public policy determination of the Louisiana Legislature in La. C.C.P. art. 123 where the lower appellate courts had no right to intervene. The lower appellate courts had a fundamental misunderstanding of the defense of *forum non conveniens.* Until the law was changed in 1999, the Louisiana courts could not dismiss a maritime case for *forum non conveniens* in a maritime case brought in state court.

"The principle of *forum non conveniens* permits the court to decline jurisdiction even though venue and jurisdiction are proper on the theory that for the convenience of the litigants and the witnesses, the action should be tried in another judicial forum." *Vaz Borralho v. Keydril Co.,* 696 F.2d 379, 385 (5th Cir. 1983). **"The Constitution does not require the United States, as a condition of applying its**

laws to its own citizens and residents, to be courthouse or lawmaker to the world." *Id.* at 389. (emphasis added.) **A foreign litigant does not enjoy any presumption in its choice of forum and that a foreign litigant's choice of forum deserves "less deference" than a plaintiff would choose in his home forum.** *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 256, 102 S.Ct. 252, 265-66, 70 L. Ed. 2d 419, 436 (1981) (emphasis added).

Until 1999 a Louisiana state court was powerless to dismiss a maritime case brought by foreign litigants on the basis of *forum non conveniens.* The previous version of La. C.C.P. art. 123 was considered by this Court's decision in *American Dredging Co. v. Miller,* 510 U.S. 443, 114 S. Ct. 981, 127 L.Ed. 2d 285 (1994). Justice Scalia, writing for the Court, concluded that the doctrine of *forum non conveniens* was a rule *of* "procedure" not "substance" and determined that Louisiana was free to adopt its own rules as to *forum non conveniens.* At that time, Louisiana's rule was markedly different from the rule observed by the federal courts in Louisiana and elsewhere. This Court noted:

> *[F]orum non conveniens is* not a substantive right of the parties but a procedural forum . . . Federal courts will continue to invoke *forum non conveniens* to decline jurisdiction in appropriate cases, whether or not the State in which they sit chooses to burden its judiciary with litigation better handled elsewhere.

510 U.S. at 455 n. 4, 114 S. Ct. at 989 n. 4, 127 L.Ed. 2d at 298 n.4.

Five years later, the Louisiana Legislature changed

Louisiana' s law of *forum non conveniens.* Act 536 of the 1999 Legislature retroactively amended Subparts B and C of La. C.C.P. art. 123 as part of remedial and curative legislation. (Appendix D- 1.) Effective June 30, 1999, a state district court was empowered to dismiss a maritime case for *forum non conveniens* where a foreign litigant asserted a cause of action "predicated on acts or omissions originating outside the territorial boundaries of the state." La. C.C.P. art. 123(B). La. C.C.P. art. 123 is crystal clear that cases of this type should not be in Louisiana's courts even though venue and jurisdiction may be technically correct.

The Legislature declared the 1999 amendment to be remedial, curative, and procedural legislation:

> **THIS ACT IS DECLARED TO BE REMEDIAL, CURATIVE, AND PROCEDURAL AND THEREFORE IS TO BE APPLIED RETROACTIVELY AS WELL AS PROSPECTIVELY.**

(Appendix D-2.) (emphasis added.)

There are no published decisions interpreting Act 536 or the amendments to La.C.C.P. art 123(B) and (C). The Louisiana Fourth Circuit's decision in a case of first impression is the first case to ever apply a waiver and estoppel theory to the defense of *forum non conveniens.* This is directly contrary to La. C.C.P. art, 123's plain language which indicates that the defense of *forum non conveniens* may be asserted by a contradictory motion and the decision is contrary to federal law. There is no time limit for asserting this defense. The lower courts were powerless to rewrite the statute in this manner.

Significantly, MHI pleaded *forum non conveniens* and

objected to the Louisiana venue in all of its responsive pleadings and did not do anything which could result in a waiver of this critical defense. Even though Louisiana procedural law prior to 1999 did not allow *forum non conveniens* to be asserted in state court nevertheless MHI relying on its constitutional rights previously objected to venue but lost and attempted to seek a dismissal on *forum non conveniens* on the basis that U. S. law was not and should not be applicable on these facts. (Appendices F, G, H, I, J and K.)

The Fourth Circuit totally ignored that this was a case involving remedial and curative legislation and impermissibly read into the law the defense of waiver or estoppel. It is well recognized that:

> The function of the Court in interpreting a statute is to ascertain the intention of the legislature and to give effect to the true legislative intent; regardless of how broad and comprehensive may be the language employed. *Bonnette v. Karst,* 261 La. 850, 261 So.2d 589 (1972); *In* re *Hibernia Bank & Trust Co.*, 185 La. 448, 169 So.464 (1936); *Anderson v.* West, 354 So.2d 636 (La. App. 1st Cir. 1977).

Hayden v. Torrence, 355 So.2d 1362,1364 (La. Ct. App. 1st Cir.), *writ denied,* 357 So.2d 1166 (La. 1978). The Louisiana Civil Code and the jurisprudence also recognize that remedial and curative legislation must be construed liberally:

> While Art. 8 of the LSA-Civil Code provides that a law can prescribe only for the future, and can have no retrospective operation nor impair the obligation of contract, it is well settled than an exception to this rule are laws which are remedial or curative in their nature. "Remedial Statutes" are statutes which confer a remedy, and **"remedy" is the means**

> **employed to enforce a right or redress an injury.** *Young v. Staman,* La. App.2d Cir., 1940, 200 So.187; *Washington Nat. Ins. Co. v. McLemore,* La. App 2d Cir., 1935, 163 So. 773. "Curative Statutes" are statutes which, by their very nature, are intended to enable persons to carry into effect that which they have designed and intended, but which have failed of their expected legal consequences by reason of some statutory disability or irregularity in their action. Such acts are, by their very nature, intended to operate on past transactions, and are necessarily retrospective. **Curative statutes, by reason of their remedial and retrospective nature, are to be liberally construed to correct the mischief or advance the remedy intended, and are applicable not only to past transactions but also to pending cases, either in the trial court or on appeal.** 82 C.J.S. Statutes s430, p. 1002.

Fullilove v. U.S. Casualty Co. of New York, 129 So.2d 816, 824 (La. Ct. App. 2d Cir. 1961)
(emphasis added.)

Now that the Louisiana legislature has adopted a *forum non conveniens* amendment which made state law consistent with federal law on this subject, the error of the appellate courts' decisions are illustrated by the flawed approach of the Fourth Circuit's analysis. The decisions of the appellate court and Louisiana Supreme Court are repugnant to the due process guidelines adopted by this Court. In *Gulf Oil Corp. v. Gilbert,* 330 U. S. 501, 67 S.Ct. 839, 91 L. Ed. 1055 (1947), this Court described the doctrine of *forum non conveniens* and held that there are various public and private interest factors that a court must weigh in determining whether a forum is convenient:

> The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. These statutes are drawn with necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy. **But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment. A plaintiff sometimes is under temptation to resort to a strategy of forcing a trial at a most inconvenient place for an adversary, even at some inconvenience to himself.**
>
> Many of the states have met misuse of venue by investing courts with a discretion to change the place of trial on various grounds, such as the convenience of witnesses and the ends of justice . . . .
>
> **Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses.**

330 U.S. at 507-08, 67 S.Ct. at 842-43, 91 L.Ed. at 1062 (emphasis added).

Relevant public and private factors outlined by this Court in *Gulf Oil* Corp. *v. Gilbert* include: The relative ease of access to sources of proof; the availability of compulsory process for the attendance of the unwilling; the cost of obtaining evidence of the willing witnesses; the possibility of a view of the premises; and "all other practical problems

that make trial of a case easy, expeditious and inexpensive." 330 U.S. at 508, 67 S.Ct. at 843, 91 L.Ed. at 1062, 67 S. Ct. at 843. Public interest factors include the administrative difficulties for courts when litigation piles up in congested centers instead of being handled at its origin; the public's interest in "having localized controversies decided at home"; and jury duty. 330 U.S. at 508-09, 67 S.Ct. at 843, 91 L.Ed. at 1062-63.

> **Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only.**

Id. (emphasis added). This is the injustice sought to be imposed here on the citizens of New Orleans.

This public interest factor was commented upon by the *Ioannides* court in dismissing Greek claims arising out of this sinking:

> There is a final public interest consideration that bears more than passing mention. This is a case brought on behalf of Greek seamen who shipped aboard a Liberian vessel crewed by a Greek company which, wherever its ownership lay, was engaged exclusively in carrying cargos to and from non-U.S. ports. There are fora and remedies available to plaintiffs under the law of their country of domicile. Three of them already have settled their claims for sums which are substantial, even if they perhaps might seem low by American standards. **There seems little justification for opening the courts of the United States — which are paid for by U.S.**

> **taxpayers and whose juries are composed of U.S. citizens asked to drop their everyday activities to serve — to claims in these circumstances even if, as plaintiffs stoutly argue, the ultimate base of operations of the vessel in question was the United States.** That no doubt is why judges of this Court repeatedly have dismissed cases like this one — all brought by the same attorney — in favor of Greek fora. [Citations omitted.]

928 F. Supp. at 380. (emphasis added.) These factors were ignored and disregarded by the Louisiana Supreme Court and the Louisiana Fourth Circuit Court of Appeals.

The Louisiana Legislature rejected the old and specifically did not establish a time limit for the assertion that a forum is inconvenient because they realized it may be the actions of plaintiffs that make it inconvenient if they refuse to come to the forum they alone originally selected. MHI filed a motion to dismiss for *forum non conveniens* at the outset. The motion was denied under then existing law which did not allow a dismissal for *forum non conveniens.* MHI's answer reserved the defense and specifically pleads that "... This forum is an inconvenient forum for the maintenance of this action and ... this matter should be dismissed under La. C.C.P. art. 123 or other applicable law." (*Ioannides* Rec. Vol. 1, P. 37). The new law went into effect on June 30, 1999 and after plaintiffs refused to appear in New Orleans for deposition MHI renewed its motion to dismiss for *forum non conveniens.* Since there was no discovery or trial fixing during the period between June 30, 1999 and the date MHI renewed its motion this could hardly be characterized as an "unconscionable" delay and the lower appellate courts erred in so concluding.

The decision below is repugnant to federal law which

recognizes that a dismissal for *forum non conveniens* may be addressed to the discretion of the court at any time. *Snam Progetti, S.P.A. v. Lauro Lines,* 387 F.Supp. 322 (S.D.N.Y. 1974). There is no time limit on when a motion to dismiss for forum non conveniens can be made. *See C.* Wright, A. Miller and E. Cooper, Vol. 15 *Moore's Fed Practice & Procedure, Jurisdiction 2d,* § 3828 (West 2002). A motion to dismiss based on *forum non conveniens* is not required to be filed prior to answer and one federal court, rejecting plaintiff's argument that the defendant had waited too long to file a motion for *forum non conveniens* stated:

> Even apart from this authority, there are sound logical reasons for not requiring a *forum non conveniens* motion to be made within the limited time period allowed for a defendant to file an answer or move to amend his answer.... This time is certainly adequate to check the venue statutes and determine whether they have been met. **However, the factors of equity and convenience, such as the location of important witnesses and evidence, which control a *forum non conveniens* motion may not be apparent without time-consuming investigation and, frequently, discovery.**
>
> **Finally, the court notes the plaintiffs will suffer no identifiable prejudice by virtue of a decision on this Motion now rather than at an earlier time during the course of this litigation.**

387 F. Supp. at 323 (emphasis added).

In *Sigalas v. Lido Maritime, Inc.,* 776 F. 2d 1512 (11th Cir. 1985), the Eleventh Circuit noted that the district court did not abuse its discretion in dismissing a case for *forum non conveniens.* The defendant filed its motion 16

days before the final pretrial conference and the court heard oral argument and granted the motion at the pretrial conference. The plaintiff contended that she was prejudiced and that the lower court committed reversible error. Plaintiff further contended that "lengthy discovery" had taken place and that the case was "ready to be tried on the merits." *Id.* at 1520. The court rejected this argument and noted that the plaintiffs' arguments of "surprise" and "wasted effort" were baseless:

> **As to the second [argument] the basis of her complaint is surprise and wasted effort. There was no surprise. The original answer included appellee's defense of *forum non conveniens.* Appellant fully briefed the question. We will not restrict the ability of district courts to dismiss cases on motions of *forum non conveniens* when it becomes clear there are no factual issues in dispute.**
>
> **The wasted effort argument suggests that appellant was put to great time and expense answering appellees' depositions and interrogatories only to have the merits adjudicated before trial. In fact it was appellant who did all of the deposing. Appellees did none. The expenses Mrs. Sigalas incurred were of her own making. An otherwise meritless case may not be bootstrapped past summary judgment merely because the plaintiff expended much effort and money in the preliminary phase of the case.**

Id. (emphasis added).

Here the Fourth Circuit erroneously applied the concepts of waiver and estoppel and relied solely upon a case that does not even involve *forum non conveniens* but

involved the claim procedures of an interstate motor carrier under the Carmack Amendment to the Interstate Commerce Act. In *Salstein v. Bekins Van Lines, Inc.*, 993 F.2d 1187 (5th Cir.1993), the plaintiff sought recovery for damage to their household goods which were being transported by a moving company. The district court granted summary judgment in favor of the moving van company and the Fifth Circuit affirmed. The plaintiffs contended that the moving company had "waived" certain claim filing requirements based on the plaintiffs dealings with a claim representative. The Fifth Circuit declined to apply waiver and estoppel and noted that waiver and estoppel were two different concepts: waiver involves the voluntary or intentional surrender of a known right whereas estoppel "arises when one party has reasonably relied on the conduct or statements of another; if the relying party suffers harm as a result of this reliance, the inducing party can be estopped from disavowing his earlier conduct or statement." 993 F.2d 1191 (citations omitted). The only *forum non conveniens* case cited was *In Re Air* Crash *Disaster,* 821 F.2d 1147 (5th Cir. 1987), *rev'd on other grounds,* 490 U.S. 122, 109 S.Ct. 1676, 104 L.Ed 2d 113 (1989), but that case specifically states that a delay in asserting the defense of *forum non conveniens* does not result in a "waiver." In the very next sentence appearing after the Fourth Circuit's quotation, the Fifth Circuit stated:

> While untimeliness will not effect a waiver, it should weigh heavily against the granting of the motion because a defendant's dilatoriness promotes and allows the very incurrence of costs and inconvenience the doctrine is meant to relieve.

Estoppel is not favored and there is nothing MHI did upon which it can be stated that MHI was estopped and/or had waived this defense. Its pleadings and actions in this case reflect that this defense was at all times preserved and was never waived. Under Louisiana law, "[e]quitable estop-

pel is the effect of a person's voluntary conduct legally precluding him from asserting rights against another, who in reliance upon that person's conduct and because of that conduct, has changed his position to the extent that he will suffer injury if that person is allowed to repudiate his conduct." *City of Bossier City v. Usery,* 356 So. 2d 1099, 1101 (La. Ct. App. 2d Cir. 1978). "Equitable estoppel is designed to foster justice by preventing a person from taking a position contrary to his prior conduct, which has been detrimentally relied upon by another person .... **Estoppel is not generally favored at law and is to be applied only in cases presenting special circumstances."** *Id.* at 1101 (citing *Wilkinson v. Wilkinson,* 323 So.2d 120, 216 (La. 1975)) (emphasis added). In *Wilkinson* Justice Dixon stated "Estoppels are not favored in our law." 323 So.2d at 126.

CONCLUSION

The Louisiana Legislature deliberately reversed and rejected the open forum concept that was forced into Louisiana law during Governor Edwards' regime and in 1999 repudiated the idea that *forum non conveniens* could not be a defense in maritime cases simply because some in the State were interested in soliciting cases from worldwide jurisdictions to bring them to trial in Louisiana courts. This legislative action was a public policy rule – made retroactive because of its importance – and cannot be ignored or interfered with by a court without deliberately violating the litigants' constitutional guarantees of due process and as this Court has opined once a legislative body enters a field a court cannot substitute its own concepts in that area. MHI respectfully requests that the Court grant this Petition and reverse and vacate the flawed decisions by the Louisiana appellate courts and that this Court reinstate the trial court's judgment which preserves any rights of the claimants to proceed to trial in a jurisdiction that would not be a burden on

the courts, taxpayers and citizens of Louisiana who have no interest in the outcome of this case.

Respectfully submitted,

Robert B. Acomb, Jr.*
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Counsel for Petitioner,
Mitsubishi Heavy Industries, Ltd.

*Counsel of Record

APPENDIX A

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 94-16056 SECTION "13" DIVISION "J"
c/w 95-19198
96-21561
97-00070

Filed FEB 9, 2001

ANGELINA CANTUBA, ET AL

VERSUS

THE AMERICAN BUREAU OF SHIPPING AND
MITSUBISHI HEAVY INDUSTRIES, LTD.

FILED: _____ _____
DEPUTY CLERK

JUDGMENT

This matter came on for hearing on December 8, 2000 on the Motion to Dismiss for *forum non conveniens* filed by defendant, Mitsubishi Heavy Industries, Ltd. ("MHI"). Present were:

Robert B. Acomb, Jr. and James E. Wright, III,
counsel for Mitsubishi Heavy Industries, Ltd.
and
David P. Gontar, counsel for Plaintiffs

Having considered the Motion to Dismiss for Forum Non Conveniens, its Memorandum in Support and exhibits attached thereto, as well as the Memorandum in Opposition filed by the plaintiffs, the lack of opposition by any other party and the argument presented at the hearing by counsel for MHI in favor of said motion and the plaintiff in opposition of said motion, the Court finds that the claims brought by the plaintiffs are predicated upon acts and/or omissions originating outside of the territorial boundaries of this state and, considering the fact that the alleged acts giving rise to this action occurred outside of the state and that almost all of the witnesses and parties except for one are located outside of this state and outside of the United States, the Court finds that, in the interest of justice, this suit should be dismissed, without prejudice, on the basis of *forum non conveniens* since this forum is an inconvenient and inappropriate forum. The Court further finds that Greece, The Philippines, Canada or Japan would be convenient and appropriate for this case in view of the location of the parties and witnesses. The Court has reviewed the stipulation of defendants and finds that it is in accordance with the requirements of La. C.C.P. art. 123 C. Accordingly,

IT IS HEREBY ORDERED that this action be and is hereby dismissed, without prejudice on the ground forum non conveniens;

IT IS FURTHER ORDERED that the plaintiffs will have 60 days from the date of this Judgment to commence a suit on the same cause of action or any cause of action arising out the
transaction in suit in a court of competent jurisdiction in Greece, The Philippines, Canada or Japan.

IT IS FURTHER ORDERED that the stipulation entered by the defendants shall be null and of no effect if such suit is not commenced within 60 days from the date of this Judgment; and

IT IS FURTHER ORDERED that this case may be reinstated in this Court in the event that the foreign forum in which such suit has been filed is unable to assume jurisdiction over the parties or does not recognize such cause of action or any cause of action arising out of the same transaction or occurrence.

New Orleans, Louisiana, this 8 day of February, 2001.

/s/ Nadine Ramsey
DISTRICT JUDGE

Feb 09, 2001

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 94-16056 SECTION "13" DIVISION "J"
c/w 95-19198
96-21561
97-00070

ANGELINA CANTUBA, ET AL

VERSUS

THE AMERICAN BUREAU OF SHIPPING AND
MITSUBISHI HEAVY INDUSTRIES, LTD.

FILED: _____ _____
DEPUTY CLERK

STIPULATION UNDER LA. C.C.P. ARTICLE 123 C
FOR DISMISSAL FOR FORUM NON CONVENIENS

Mitsubishi Heavy Industries. Ltd. The American Bureau of Shipping. The Salvage Association, Ltd. and Paul Francis Daniel (hereinafter referred to collectively as "defendants") who, in accordance with this Court's ruling on December 8, 2000 and Article 123 *C* of the Louisiana Code of Civil Procedure, submit the following stipulation:

1. The defendants shall waive any defense based upon prescription or the statute of limitation that has matured since the commencement of this action in Louisiana provided that a suit on the same cause of action or on any cause of

action arising out of the same transaction or occurrence of this case is commenced in a court of competent jurisdiction in Greece, The Philippines, Canada or Japan within 60 days from rendition of the judgment of dismissal in the captioned case:

2. The defendants stipulate that any depositions which have been taken in these consolidated proceedings may be used by any party in any action commenced in accordance with Stipulation No. 1 above to the extent allowed by the forum: and

3. This stipulation shall be null and of no effect if suit is not commenced within the 60 days from the date of the judgment of dismissal herein.

Respectfully submitted,

/s / JAMES E. WRIGHT, III
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ATTORNEYS FOR THE SALVAGE
ASSOCIATION. LTD. and
FRANK DANIEL

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 24th day of January 2001, served a copy of the foregoing pleading on counsel for all parties to this proceeding by hand delivery and/or by mailing the same by United States mail, properly addressed and first class postage prepaid.

/s/ JAMES E. WRIGHT, III

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

CANTUBA, ANGELINA

VERSUS CASE NO. 94-16056

AMERICAN BUREAU OF
SHIPPING, ET AL

APPEARANCE:

REPRESENTING THE PLAINTIFF:

JIM WRIGHT, ATTORNEY AT LAW

REPRESENTING THE DEFENDANT:

DAVID GUNTER, ATTORNEY AT LAW

ALSO PRESENT: BOB AIKMAN

REPORTED BY: PINKEY FERDINAND

CERTIFIED COURT REPORTER

DIVISION "J"

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PROCEEDINGS

BY MR. WRIGHT:

Good morning, Your Honor.

BY THE COURT:

Good morning.

BY MR. WRIGHT:

Jim Wright for Mitsubishi Heavy Industries Limited. Bob Aikman is with me in the court.

BY MR. GUNTER:

Your Honor, I'm David Gunter with Randy Ungar's office for the Plaintiff.

BY MR. WRIGHT:

This matter is before the Court on Mitsubishi's Motion to Dismiss on Forum Non Conveniens based upon the new amendment to Article 123 (B) of the Louisiana Code of Civil Procedure removing the barrier to the application of Forum Non Conveniens in maritime cases. It is submitted that this incident involving a foreign flagship owned by Greek nationals sailing from Septile (phonetic), Canada to Engimen, (phonetic) The Netherlands, sinking with all lost aboard crewed by all foreigners. The ship having never sailed into U.S. waters in the history of the vessel that this Court located at Loyola and Poydras has no interest in resolving this foreign dispute. And we bring this motion now, because previously we were — The statute provided that it did not apply in maritime cases. We had brought venue objections before, which were denied, so we attempted to preserve those issues, but the law was not in place to protect us in that regard, Your Honor.

Now, the legislature has amended the law, made it retroactive to apply to pending cases, therefore, the legislature is acknowledging that waiver would not be an issue, because they would not have made it applying to pending cases.

In our reply memorandum we point out to the Court that when the Segura case by the Louisiana Supreme Court, when the law has changed during the pendency of a suit, and the retroactive application of the new law is permissible, the new law applies even on appeal, though it requires reversal of the trial court's previous judgment. Previously this Court had denied Mitsubishi's Motion to Dismiss on Forum Non Conveniens. This Court has the discretion to reconsider previous rulings in light of changes in the law. Now, the issue of" Forum Non Conveniens as set forth in the statute requires that the acts or omission giving rise to the lawsuit occur outside of the territorial boundaries of the state. That is uncontested in this situation.

There also has to be a more appropriate forum outside of the state taking into consideration where the acts giving rise to the action occurred. Let's focus on that, Your Honor. In this situation, nothing occurred within the boundaries of Louisiana, much less the United States. The ship was repaired in 1993. This last major repairs in 1993 in Parais (phonetic), Greece, which is a suburb of Athens basically. That is a major allegation that has been raised by the Plaintiffs in this case, and was also raised by some of the same Plaintiffs in the New York case, which we cited to you, the Ieanetis (phonetic) versus the Marika Maritime Corporation case, which I'm going to get to later. Nevertheless, no acts occurred in the Louisiana, much less the United States.

My client, Mitsubishi Heavy Industries, built the ship in Japan some 20 years ago. The surveys of the vessel occurred outside of this country by foreign nationals. Even though they may have been employees of ABS, they were Greek employees of ABS. They have been deposed. They live in Athens, Greece. The convenience of the parties and witnesses consideration of the statute takes into consideration the ability of this Court to have witnesses within it's subpoena power, and also to have the ability to get witnesses to come and testify live. At the present situation we have, I believe, just one witness in the subpoena power of this court, a party who was sued, not originally in this case, but was sued some two years after the suit was pending, Salvage Association employee. The original suit was brought against Mitsubishi and ABS alone.

We submit to the Court that several of the Plaintiffs that are in this suit were also parties of a suit in the Southern District of New York in the Ieanetis (phonetic) versus Marika Maritime case in the Southern District of New York where the Federal District Court considering these facts found that the factors set forth by Golforell (phonetic) versus Gilbert for a choice of law and for the Forum Non Conveniens application of federal law dictated that this case be sent to Greece for adjudication. The Court considered that the last major repairs to the Marika were made in 1993 in Parias, made by witnesses who reside in Parias, Greece, that the ship never sailed in the United States. There is no connection of any activity in the United States.

And taking into consideration the public and private factors, the Court found that the availability of compulsory process, the possibility to review the premises, of course that

doesn't apply this case. But the possibility of the practical problems that make the action easy to adjudicate here just don't exist. Since we don't have the ability to bring any witnesses, I believe if we try the case here we'll have no live witnesses. In fact, the convenience of the parties is further dictated by the fact that the Plaintiffs themselves refuse to travel here. As the Court may remember, a year ago we attempted to get the Plaintiffs in New Orleans to be deposed and they refused to come here saying it was inconvenient. So that their own behavior indicates that they don't want to come here. I don't even believe they want to come here for trial.

The public factors include the burden on this Court of having to have it's docket congested with a case involving foreign nationals and a foreign incident, having jurors from this parish burdened with having to sit through a several week trial for a matter that has no concern to them at all. There is just simply no localized interest to have this matter heard at Loyola and Poydras. So, we submit to Your Honor that —

Now, the Plaintiffs have argued that the Ieanetis case involved the suit against an employer where there was choice of law, and four are in the contract of the employment. If you read the Ieanetis case, that was a factor considered, but it was not the controlling factor. The Court did go through the Gilbert factors and found that foreign law was likely to apply, and that there was just no basis to have this matter heard, because all the acts occurred outside of the United States. And we ask the Court that regard to the question of what is a proper forum, the Plaintiffs have suggested that we don't have — we haven't picked one. Well, I think there are four possibles for — that's a matter that we can

resolve by having the Plaintiffs file the suit in Greece where most of the witnesses are with regard to the repairs and the survey of the ship. The suit could be filed in Canada where the ship was loaded.

There are issues regarding whether the ship was properly loaded and whether the cargo shifted at sea causing the ship to sink. The suit could be brought in Japan where my client exist and has all the employees that were involved in the ship construction who will need to be deposed, or even the Philippines where the Plaintiffs themselves apparently don't want to leave. They want to stay there and have us go there to depose them. They want to use this court, however, to litigate their claims and not even show up here.

So, I suggest that any one of those four jurisdictions would be appropriate. And if the Court needs more briefing on that, we can provide more information in that regard. Thank you, Your Honor.

BY MR. GUNTER:

Good morning, Your Honor. David Gunter for the Plaintiffs in this case. As I read Ieanetis (phonetic) case it was definitely a forum selection clause case in which the signatories to the contract included the mover Defendant. And that's not the case here. Mitsubishi was a shipbuilder. I didn't participate in the contract of employment that contained the forum selection clause. And I don't know how it can cite Ieanetis, or Lahono (phonetic), or any other employment contract forum selection clause case, because those facts are not present here. I'm trying to find out where the inconvenience is that Mitsubishi is complaining about. Where is the beef?

Does Mitsubishi carry it's burden, and it has a burden

of showing that it, Mitsubishi, is going to be inconvenienced by continuing to litigate where this case has been for six years. I got a reply brief last evening from Mitsubishi in which Mitsubishi argues that the Plaintiffs are inconvenienced. There is not a word in there about Mitsubishi's inconvenience. This is a very strange argument.

We were before this Court after the change in the law, Article 123, which was changed in the summer of 1999, and the Plaintiffs at that time agreed to pay for Mitsubishi's expenses to conduct depositions in the Philippines. And I think that that was the agreement that was reached between the parties. So, one wonders again, where is the inconvenience to Mitsubishi. Defendant didn't raise Forum Non Conveniens after the change in the law in June of 1999, but entered into the agreement that I'm citing to the Court.

I would like to know also, with respect to discovery, the discovery that's already been performed in the case, is that discovery going to be accepted by a new court in a foreign country, or are we going to have to re-depose and re-perform all of the discovery that's been done at a cost to the Plaintiffs of millions of dollars.

The Plaintiffs ask in this case, how could there be Forum Non Conveniens with a Louisiana Defendant in this case. Once you have a Louisiana Defendant, the Court's interest in this case is not slight, it is substantial. And Mr. Daniels is a bonafide, legitimate, and an important witness and Party Defendant in this case, who was the last person to inspect this vessel in South America.

Again, the Forum Selection Clauses and the cases

which turn on them are irrelevant. The Defendant would like to pretend that all the parties in this case are foreign, but Mr. Daniels is within the subpoena power of this court and under the Porter's case, 663 F Sub 494, you have to look. The Courts stress this factor. They stress "Do you have a local Defendant?" I've brought a copy of the Porter case for the convenience of the Court. As Mitsubishi cited, a single Louisiana case which says that: "Even though a Defendant is domiciled in Louisiana the case can be dismissed for Forum Non Conveniens." I think the answer is no.

Mitsubishi says the law has changed, but the law has not changed. You still can't raise the terms of the contract you haven't signed. And you still can't succeed in Forum Non Conveniens. Well, one of the principal Defendants resides in this parish. And Judge DiRosa knew that, and that's why he denied the Exceptions. So, as far as the Plaintiffs are concerned, this case is governed by the law of the case. And the 1997 order still stands.

We need to take discovery. Discovery needs to be performed in Japan, the Philippines, Greece, whether the case is removed or not. How will the dismissal of this case to one of those other countries make litigation any easier. We've already agreed to pay for the discovery to be done in the Philippines. There is a Louisiana Party Defendant. There are American witnesses. The Defendants contend that all of the American witnesses have been deposed. We don't agree with that. I don't know how the Defendants can make that claim. The Defendants themselves have taken depositions in this country. They went to Chicago, Illinois. They invoked the authority of this Court and acquiescence in the venue and the authority of this Court by conducting discovery in this

country. Ordinary in Forum Non Conveniens they would be arguing that there isn't any discovery to be performed in the United States of America. But they conducted American discovery.

The Plaintiffs selected this forum. That selection should be accorded deference under the Rich Duke case. The cite is 734 F sub 142. And this is what the Court said in the Rich Duke case.

> "A district court abuses it's discretion if it fails to state exactly what deference it shows to a foreign Plaintiff."

So, in this case, a case before this forum for six years with a local defendant with American witnesses in which Defendants have noticed and taken depositions here, and nearly a year has passed since the law changed, which is Article 123. If Plaintiffs are accorded deference for their forum selection, what Possible basis could there be for a dismissal now? Certainly not the cases cited by Mitsubishi. Ieanetes (phonetic) is irrelevant. It's a forum selection clause case. Lahono (phonetic) for the Louisiana Supreme Court is another forum selection case. It predates the change in Article 123, and it proves that — only that for a defendant to assert forum selection clauses it must have privity of contract, which Mitsubishi doesn't have. Garcia was a procedural capacity case. It did not involve a Louisiana plaintiff or defendant. For Forum Non Conveniens purposes it's useless.

The Defendants submit a reply brief which argues that Forum Non Conveniens should be granted for the convenience of the Plaintiffs. This is an astonishing argument.

Under Gilbert, the U.S. Supreme Court case, the Defendant must show that the Defendant is inconvenienced by the forum. Our Plaintiffs respectfully object and point out that they have selected this forum for the trial, and that selection should be accorded deference by the Court. Defendant has no standing to argue Forum Non Conveniens for the Plaintiffs.

We all know, Your Honor, that depositions need to be taken in this case in many countries. Multi-national depositions do not imply a foreign forum, Your Honor. With witnesses located throughout the world in five countries, Defendant claims that any one of the four countries are somehow more convenient than the United States for trial. And this is baffling and inexplicable to me. All the depositions can be transcribed and recorded for use here at trial. And I think that the Court should consider how convenient it would be to try this case in the Philippines if key witnesses are located in Greece, Canada, The United States, and Japan. What is the practical advantage?

And if I might just mention the Piper case, because I think that's an important case that the Court would want to look at. Everything in the Piper case was located in Scotland. The accident was there, the witnesses were there, the Plaintiff families were there. It was a one-nation focus. And that's missing here. You don't have a country where the accident happened. You have an accident in international waters, and Defendant points this out. How does a sunk vessel in international waters imply that this forum is inappropriate to litigate. We don't have a center of gravity. And a lot of these cases are center of gravity cases that turn on one nation having all of the interest. We've got five countries of interest where there are witness, and one party here. We

respectfully ask that the Motion to Dismiss be denied.

BY MR. WRIGHT:

Just a couple of points, Your Honor. The Ienetes (phonetic) case is a Forum Non Conveniens case on the very facts of this case. The forum selection clause in the contract is only one of the factors considered, not the controlling fact of the construed, the Gulf Oil verus Gilbert facts, which were the cornerstone of maritime Forum Non Conveniens. The contention by the Plaintiff that there is a Louisiana defendant, and therefore, we have to stay here, that's contrary to the statute of the legislature which says only that if the Plaintiff — It says:

> "No suit in which a Plaintiff is domiciled in this state, and which is brought in the court which is
>
> otherwise a court of competent jurisdiction shall be dismissed under this article."

It doesn't anything about a defendant in Louisiana..

The principals of Forum Non Conveniens assume that there is proper jurisdiction and venue. It's the power of this Court in it's discretion to find a more convenient forum because, as the Court knows, suits can be brought in many jurisdictions and the Plaintiff select the jurisdiction. I think that the jurisdiction was selected here because I believe the only contact that I saw at the outset of the Louisiana was that the Plaintiff's law firm is located here in New Orleans. The U.S. Supreme Court has recognized that the principal of Forum Non Conveniens is simply that a Court may resist imposition upon it's jurisdiction even when jurisdiction is authorized by the general venue statute. I submit that it assumes that we're in a proper court. It gives this Court the power to find a more convenient court.

As far as the issue of discovery, we don't need to do discovery over again. That can be taken care of in the stipulations that are set forth in Section C of Article 123. We can add a stipulation to that affect, that all discovery will be binding on all parties that have been taken.

With regard to the depositions in Chicago, the only depositions that Mitsubishi has noticed were the Plaintiff's depositions here in New Orleans after our Motions to Dismiss for Forum Non Conveniens and for Improper Venue dismissed, and the Plaintiffs refused to come. The deposition in Chicago was noticed by the Plaintiff, and not by Mitsubishi. We attended after already having preserved our objections to venue.

Your Honor, the evidence is overwhelming that this case doesn't belong here; that it's a foreign dispute between foreign entities. And we don't need to burden this court and the citizens of this city with jury duty to resolve this foreign dispute. Thank you very much.

BY THE COURT:

I guess if I've seen a case that needs to be transferred, it's this one. And I guess that was my thought since I've had the case and the motion had been denied, so I'm going to grant the Motion to Dismiss.

BY MR. WRIGHT:

Thank you, Your Honor.

BY THE COURT:

Prepare a Judgment, please.

BY MR. WRIGHT:

Thank you, Your Honor. We'll submit a stipulation in accordance with the —

BY THE COURT:

Regarding — Yeah, I don't know where you want —

BY MR. WRIGHT:

— 123 (C) and circulate that within the time frames of both statute dates (phonetic. In agreement with the Court as well.

[WHEREUPON THE HEARING CONCLUDED]

REPORTER'S CERTIFICATE

I, Pinkey Ferdinand, Certified Shorthand Reporter, in and for the State of Louisiana, do hereby certify that the foregoing transcript was reported to me and transcribed under my personal direction and supervision, and is a true and correct transcript to the best of my ability and understanding.

That I am not of counsel, not related to counsel, nor the parties hereto, and not in any way interested in the events of this suit.

SIGN THIS 27*th* day of December, 2000.

/s/ Pinkey Ferdinand
Pinkey Ferdinand
Official Reporter, Division "J"

APPENDIX B

ANGELINA CANTUBA	*	NO. 2001-CA-1139
VERSUS	*	COURT OF APPEAL
THE AMERICAN BUREAU OF SHIPPING AND MITSUBISHI HEAVY INDUSTRIES, LTD.	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA
	*	

* * * * * * * *

CONSOLIDATED WITH:	CONSOLIDATED WITH:
MARILYN ALBA DEAN, ET AL.	NO. 2001-CA-1140
VERSUS	
THE AMERICAN BUREAU OF SHIPPING AND MITSUBISHI HEAVY INDUSTRIES, LTD.	
CONSOLIDATED WITH:	CONSOLIDATED WITH:
EKATERINI IOANNIDES, ET AL.	NO. 2001-CA-1141
VERSUS	
THE AMERICAN BUREAU OF SHIPPING AND MITSUBISHI HEAVY INDUSTRIES, LTD.	

CONSOLIDATED WITH:

MARIVIC R. SILVA,
AVELLINA BESADA,
JOHNATHAN DEAN AND
ADELINA CASINILLO

VERSUS

THE AMERICAN BUREAU
OF SHIPPING AND MITSUBISHI
HEAVY INDUSTRIES, LTD.,

**SALVAGE ASSOCIATION,
LTD. AND PAUL FRANCES
DANIEL**

CONSOLIDATED WITH:

NO. 2001-CA-1142

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NOS. 94-16056, C/W 95-19198 C/W 96-28561 C/W 97-70,
DIVISION "J-13"
HONORABLE NADINE M. RAMSEY, JUDGE

* * * * * *

JUDGE MICHAEL E. KIRBY

* * * * * *

(Court composed of Judge Miriam G. Waltzer, Judge Michael E. Kirby, Judge David S. Gorbaty)

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REVERSED AND REMANDED

Plaintiffs appeal the dismissal of their lawsuits on the basis of *forum non conveniens,* more than six years after the filing of said lawsuit.

STATEMENT OF THE CASE

The M/V MARIKA, a bulk carrier measuring 919 feet in length loaded with 140,000 tons of pelletized iron ore, sank in international waters on January 1, 1994 in a North Atlantic winter storm. The MARIKA, a vessel registered in Liberia, was on a voyage from Canada to the Dutch port of Ijmuniden. The MARIKA and all its Greek and Philippine seamen were lost. The vessel was built in Japan by defendant-appellee Mitsubishi Heavy Industries, Ltd.

The surviving families brought suit on October 13, 1994 in Civil District Court in Orleans Parish against the American Bureau of Shipping, the Salvage Association, Paul Francis Daniel and Mitsubishi Heavy Industries, Ltd.

From the filing of this lawsuit in 1994 to December 2000, the date on which it was dismissed on the grounds of *forum non conveniens,* numerous interrogatories were propounded and answered, depositions were taken, and numerous motions were made. Especially noteworthy are motions made by the defendants that invoked the court's authority and requested judicial relief.

On June 30, 1999, the Louisiana Legislature's Act 536 which amended LSA-C.C.P. art. 123 became effective, permitting dismissal of maritime suits for *forum non conveniens.* On November 2, 2000, Mitsubishi filed a Motion to Dismiss for *forum non conveniens.* The matter came before the trial court on December 8, 2000. After hearing oral argument, the trial court granted the motion without reasons for judgment. Plaintiffs appeal this Judgment.

STATEMENT OF THE LAW

The standard of review in this case is whether the trial judge abused her discretion. The abuse of discretion standard of review is appropriate because La. C.C.P. art. 123, which treats *forum non conveniens,* permits — it does not mandate – that a case be transferred if certain conditions are fulfilled. This gives the trial judge the discretion to grant the motion to transfer or not, and we review whether or not that discretion was abused. *A.0. Smith Corp.* v. *American Alternative Insurance Corp.,* 2000-2485 (La. App. 4 Cir. 12/27/00), 778 So.2d 615, 619, *writ denied,* 2001-0275 (La. 3/23/01), 787 So.2d 321; *Piper Aircraft Company v. Reyno,* 454 U.S. 235, 257, 102 S.Ct. 252, 266, 70 L.Ed.2d 419, 436 (1981); *Karim v. Finch Shipping Company, Ltd.,* 265 F.3d 258, 2001 A.M.C. 2618 (5th Cir. 9/5/01).

Plaintiff assigns several errors in the granting of defendants motion to dismiss for *forum non conveniens,* La. C.C.P. art. 123. They argue the motion to dismiss was untimely, it ignored the age of the case and the presence of a Louisiana defendant. They argue the defendant failed to establish that there was another adequate alternative forum. The defendants also make several other arguments, including a constitutional argument. We find the most compelling argument to be that the motion was untimely and the trial court ignored the age and status of the case.

Defendant, Mitsubishi, argues that La. C.C.P. art. 123 prescribes no time limit for bringing a dismissal for *forum*

non conveniens. They also cite a Federal case from the Southern District of New York[1], arising out of this sinking, which has very little precedential value outside of that state.

While it is true Defendant filed a motion to dismiss for *forum non conveniens* in March of 1997, a few years before the Amendment to art. 123, we view this as highlighting the fact that with all the more reason defendant should have re-filed its motion to dismiss after the statute had been amended permitting such a dismissal.

The parties in a civil suit are charged with knowledge of the law. *Succession of Moore v. Moore,* 387 So.2d 1231 (La.App. 1 Cir. 1980). The Amendment to La. C.C.P. art. 123, which allows for dismissal of admiralty cases via *forum non conveniens,* became effective on June 30, 1999. Nearly a year and a half after the Amendment, on November 2, 2000, the defendant, Mitsubishi, filed its motion to dismiss for *forum non conveniens.* Because the defendant is charged with knowledge of the law, the fact that Mitsubishi may have filed a motion to dismiss years before the Amendment is not very relevant. The appropriate time to file would have been immediately following the amendment, We find that in a case that is six years old, to delay for an additional sixteen (16) months before filing a motion to dismiss based upon an amendment in the law is so dilatory as to be unconscionable.

We find the plaintiffs also correctly noted that defendant had acquiesced in jurisdiction and venue. By filing pleadings and noticing depositions subsequent to the moment a motion

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[1] *Ioannides v. Marika Maritime Corp.,* 928 F. Supp. 374 (S.D.N.Y. 1996).

to dismiss on the basis of *forum non conveniens* might have been filed, defendant waived any right to petition the court for such relief.

Waiver exists when there is: (1) an existing right, benefit or advantage; (2) knowledge of its existence and (3) actual intent to relinquish the right, which can be inferred from conduct. See, *Salzstein v. Bekins Van Lines, Inc.*, 993 F.2d 1187 (5th Cir. 1993). Mitsubishi knew of its right in June of 1999 to seek dismissal, but filed pleadings and sought judicial relief from the tribunal it now seeks to escape.

We find that the defendants waived their right to argue *forum non conveniens* and/or are estopped from doing so when they invoked the authority of the trial court five times after the time the Amendment to La. C.C.P. art. 123 became effective. The last of these acts, the notices of deposition, were filed seven months after the effective date of the act.

Specifically, Mitsubishi filed the following after the amendment: two motions for extension of time to answer interrogatories, the latter request was granted; a "notice of depositions" of plaintiffs; a memorandum in opposition to plaintiffs motion to quash, said deposition specifically invoking the authority of the trial court and requesting judicial relief, and finally, another "notice of depositions" of five witnesses.

Authority exists supporting the importance of a timely filing of a motion for *forum non conveniens.* The United States Court of Appeals for the Fifth Circuit stated:

> We believe ... that the better rule would be that a defendant must assert a motion to dismiss for *forum non conveniens* within a reasonable time after the facts or circumstances which serve as the basis for the motion have developed and became known or reasonably knowable to the defendant. See, *Wright, Miller & Cooper, Fed. Practice and Procedure:* Jurisdiction § 3828, at 291 (2d Ed. 1986); Cf. *Creamer v. Creamer,* 482 A.2d 346, 352 (D.C. App. 1984). *In Re Air Crash Disaster at New Orleans, La.,* 821 F.2d 1147, 1987 A.M.C. 2735 (5th Cir. 1987).
>
> Further, "[U]ntimeliness ... should weigh heavily against the granting of the motion to dismiss for *forum non conveniens* because a defendant's dilatoriness promotes and allows the very incurrence of costs and inconveniences the doctrine is meant to relieve." *In Re Air Crash Disaster, supra,* 821 F.2d at 1165.
>
> The moving defendant must submit its motion in a timely manner.

In Re Air Crash Disaster, supra, 821 F.2d at 1165.

Here, defendants had almost five years to ascertain the facts and circumstances surrounding the motion to dismiss. We find this was more than sufficient time. Therefore, when the Amendment to La. C.C.P. art. 123 was enacted, defendant should have acted within a reasonable amount of time. We find the delay of sixteen months, tacked onto almost five years, is unreasonable.

It has long been the holding of this court that laches

is the "neglect for unreasonable length of time to do what should have been done" Triangle Oil Co. v. City of New Orleans, La. App. 5 So.2d 558, 561, 562; See also *Sherlock v. Ocean Salvage Corp.*, 2000-0886 (La.App. 4 Cir. 3/28/01), 785 So.2d 932; *Metro Riverboat Associates, Inc. v. Louisiana Gaming Control Bd.*, 1999-2241 (La.App. 1 Cir. 3/7/01), 798 So.2d 143; *Landry v. Latter,* 2000-0100 (La.App. 4 Cir. 12/29/00), 780 So.2d 450. We find the delay of sixteen months after five years of litigation to be so dilatorious as to make it an abuse of discretion to grant a motion to dismiss for *forum non conveniens.*

This case was filed and has been acted upon in Civil District Court since 1994. Whether it be by laches, waiver or estoppel, we find that the trial court abused its discretion in dismissing this case on a Motion to Dismiss for *forum non conveniens* that was filed nearly a year and a half after the Amendment to art. 123, and six years after the start of this litigation.

For the aforementioned reasons, we reverse and remand for proceedings in accord with this opinion.

REVERSED AND REMANDED

APPENDIX C

The Supreme Court of the State of Louisiana

ANGELINA CANTUBA

VS. NO. 2002-C-0743

THE AMERICAN BUREAU OF SHIPPING AND MITSUBISHI HEAVY INDUSTRIES, LTD.

AND OTHER CONSOLIDATED CASES

- - - - - -

IN RE: Mitsubishi Heavy Industries Ltd.; - Defendant; Applying for Writ of Certiorari and/or Review, Parish of Orleans, Civil District Court Div. J, Nos. 94-16056, 95-19198, 96-21561, 97-00070; to the Court of Appeal, Fourth Circuit, No(s). 2001-CA-1139, 2001-CA-1140, 2001-CA-1141, 2001-CA-1142

- - - - - -

May 10, 2002

Denied.

CDT
PFC
CDK
BJJ
JLW

Supreme Court of Louisiana
May 10, 2002
/s/ Katherine A. Fontana
Deputy Clerk of Court
For the Court

APPENDIX D

Art. 123. Forum non conveniens

A. For the convenience of the parties and the witnesses, in the interest of justice, a district court upon contradictory motion, or upon the court's own motion after contradictory hearing, may transfer a civil case to another district court where it might have been brought; however, no suit brought in the parish in which the plaintiff is domiciled, and in a court which is otherwise a court of competent jurisdiction and Proper venue, shall be transferred to any other court pursuant to this Article.

B. Upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated upon acts or omissions originating outside the territorial boundaries of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice, the court may dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article.

C. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the defendant or defendants to file with the court a waiver of any defense based upon prescription that has matured since the commencement of the action in Louisiana, provided that a

suit on the same cause of action or on any cause of action arising out of the same transaction or occurrence is commenced in a court of competent jurisdiction in an appropriate foreign forum within sixty days from the rendition of the judgment of dismissal. Such waiver shall be null and of no effect if such suit is not filed within this sixty-day period. The court may further condition the judgment of dismissal to allow for reinstatement of the same cause of action in the same forum in the event a suit on the same cause of action or on any cause of action arising out of the same transaction or occurrence is commenced in an appropriate foreign forum within sixty days after the rendition of the judgment of dismissal and such foreign forum is unable to assume jurisdiction over the parties or does not recognize such cause of action or any cause of action arising out of the same transaction or occurrence. Amended by Acts 1999, No. 536, § 1, eff. June 30,1999.

Retroactive application-Acts 1999, No. 536

Section 2 of Acts 1999, No. 536 (§ 1 of which ameno pars. B and C of this article) provides:

"This Act is declared to be remedial, curative, and procedural and therefore is to be applied retroactively as well as prospectively.

Historical and Statutory Notes

Acts 1999, No. 536, § 1, rewrote par. B as pars. B and C and deleted former par. C. Prior to amendment, pars. B and C provided:

"B. Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim

or cause of action is predicated solely upon a federal statute and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice, the court may dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the defendant or defendants to file with the court a waiver of any defense based upon prescription, provided that a suit on the same cause of action is commenced in a court of competent jurisdiction within sixty days from that rendition of the judgment of dismissal.

"C. The provisions or Paragraph B shall not apply to claims brought pursuant to 46 USC § 688 or federal maritime law."

APPENDIX E

Ekaterini IOANNIDES, Individually, and as Personal Representative of the Estate of Dimitrios Ioannides, Deceased, et al., Plaintiffs,

v.

MARIKA MARITIME CORP., et al., Defendants.

95 Civ. 1795 (LAK).

United States District Court,
S.D. New York.

June 12, 1996.

Relatives and personal representatives of deceased crew members who died when Liberian flag vessel sank in international waters brought suit seeking to recover under the Death on the High Seas Act (DOHSA) and general maritime law. On motion to dismiss on ground of forum non conveniens, the District Court, Kaplan, J., held that dismissal on ground of forum non conveniens was appropriate, considering that all critical events at issue took place in Greece, and that the United States had little interest in providing forum for case brought on behalf of Greek seamen who shipped aboard Liberian vessel crewed by Greek company engaged exclusively in carrying cargos to and from non-United States ports.

Motion granted.

1. Federal Courts ⇨ 45

Faced with forum non conveniens motion, court must make threshold determination whether alternative forum exists in which case may be heard; assuming there is such forum, court must then balance series of private and public interests in determining whether to retain case or dismiss it in favor of alternative forum.

2. Federal Courts ⇨ 45

In determining whether to grant forum non conveniens motion, important considerations are: relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and costs of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to action; and all other practical problems that make trial of case easy, expeditious and inexpensive.

3. Federal Courts ⇨ 44

Plaintiffs choice of foram ordinarily is given great weight in deciding forum non conveniens motion.

4. Federal Courts ⇨ 45

Suit brought by relatives and personal representatives of deceased crew members who died when Liberian flag vessel sank in international waters would be dismissed on ground of forum non conveniens, considering that plaintiffs, who were Greek nationals, had adequate alternative forum in Greece, that all critical events occurred in Greece, and that all persons indicated to have knowledge of events were located in Greece; moreover, it was likely that Greek law would govern case, and United States had little interest in providing forum for case brought on behalf of Greek seamen

who shipped aboard Liberian vessel crewed by Greek company which was engaged exclusively in carrying cargo to and from non-United States ports.

Paul S. Edelman, Kreindler & Kreindler, New York City, for Plaintiffs.

Patrick J. Bonner, Freehill, Hogan & Mahar, New York City, for Defendants Marika Maritime Corp., Astron Management Corp., Atlantic Maritime Enterprises, S. A. and Thomas Peter Pappas.

Michael D. Wilson, Michael J. Walsh, Pamela L. Milgrim, Kirlin, Campbell & Keating, New York City, for Defendant American Bureau of Shipping.

MEMORANDUM OPINON

KAPLAN, District Judge.

On New Year's Day 1994, the M/V MARIKA foundered and sank in international waters some 700 miles east of Newfoundland with the loss of all hands. Plaintiffs—relatives and the personal representatives of five deceased crew members, all of whom were Greek nationals here seek to recover under the Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 761 *et seq.*, the Jones Act, 46 U.S.C. § 688, and the general maritime law against the vessel's owner, others affiliated with it, and the American Bureau of Shipping ("ABS") on various theories. The defendants move to dismiss the action under the doctrine of *forum non conveniens* and, in some instances, on other bases.

Facts

Parties

The plaintiffs, as noted, all are Greek nationals and family members of seamen who died in the sinking. They sue both individually and as personal representatives of the decedents.

Defendant Marika Maritime Corp. ("Marika") is a Liberian corporation which is alleged to have owned and operated the M/V MARIKA at all relevant times. (Cpt ¶¶ 2, 6-7) It employed the crew, including plaintiffs' decedents. (De Luca Aff. ¶ 8) It is important to note that the MARIKA did not carry cargo to or from, or engage in trade in, the United States while owned by Marika. (*Id.* ¶ 7) Defendants Atlantic Maritime Enterprises, S.A. ("Atlantic") and Astron Management Corp. ("Astron"), which are Greek and Connecticut corporations respectively, both performed various tasks and functions for Marika including assisting with financing, chartering, crewing, engineering and day-to-day operations. (Bonner Aff. ¶ 4) Atlantic, which has an office in the Greek port of Piraeus, handled crewing matters, maintenance, repairs, surveys and insurance matters. Astron was involved in financing and chartering. (De Luca Aff. ¶¶ 3–4) Thomas Peter Pappas is a Greenwich, Connecticut, resident who is alleged to control, and to be the *alter ego* of, Atlantic, Astron and Marika. (Cpt ¶ 13)

ABS is a not-for-profit classification society created in 1862 by act of the New York Legislature for the purpose of promoting the security of life and property at sea.[1] (Bourneuf

1. "Classification societies are defined as 'organized societies which undertake to arrange inspections and advise on the hull and machinery of a vessel from its initial stages in new building and thereafter.

Aff. ¶ 2) It has offices in more than eighty countries around the world, including an office in Piraeus, Greece. (*Id.*) It establishes and administers standards for plan review, construction survey and periodic survey of merchant ships and other marine vessels and structures. (*Id.*)

The Events Here At Issue

The last major repairs to the MARIKA were made during the period March 12 through April 16, 1993 in Piraeus (Kopsinis Aff. ¶ 9) at which time Dimitrios Lambros and Christos Nomikos, surveyors in ABS's Piraeus office, conducted several classification and statutory surveys[2] aboard the MARIKA (Bessis Ded. ¶¶ 3, 19) Vasilios Spyridonos of Atlantic was present on behalf of Atlantic. (¶ 5) Assodivers, I & T *Kalogeridis*, Ultratest Marine Technical Bureau, and Electromarine Co. of Piraeus—all based in Piraeus, Greece—performed repairs on the vessel or assisted ABS. (*Id.* ¶¶ 6-20; Kopsinis Aff. ¶¶ 9-14)

The plaintiffs, to the extent revealed by the record, all signed on to the MARIKA in Piraeus at various dates on or

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(footnote 1 continued)
The societies produce a certificate concerning the vessel's seaworthiness in accordance to the trade within which it is intended to, or does, work.' The societies' classification does not extend to manning or operation of a vessel." Damien L. O'Brien, *The Potential Liability* of *Classification Societies to Marine Insurers Under United States Law, (7 U.S.F.* Mar. L.J. *403 (1995)* (quoting Eric SULLIVAN, THE MARINE ENCYCLOPEDIA DICTIONARY *78 (1980)).*

2. Classification surveys are surveys required by ABS rules. Statutory surveys are surveys required by the nation of a vessel's registration, here Liberia.

after December 7, 1992. All entered into contracts of employment with Marika which were expressly subject in certain respects to the Greek Collective Agreement, a collective bargaining agreement,[3] and which provided that Greek law governed and "absolutely prohibited" recourse to courts of countries other than Greece. (Kopsinis Aff. ¶ 6 & Exs. B1, B2)

On December 24, 1993, the MARIKA loaded 140,000 metric tons of iron ore at Seven Islands, Canada, and sailed for Ijmuiden, the Netherlands, on December 27, 1993. (Cpt ¶ 25) As noted, the ship was lost with all hands on January 1, 1994. (*Id.* ¶ 26)

Shortly after the sinking, the vessel's owners, operators, agents and insurers engaged Spyridon Karakitsos, an attorney and partner in the Greek law firm Deucalion Rediadis and Sons. Karakitsos promptly negotiated settlements and obtained releases from three of the five plaintiffs in this case. As a portion of each settlement was allocated to claims under Greek Workers Compensation Law, each was approved by the Greek court. The settlements ranged from the U.S. dollar equivalents of $113,300 to $255,000. (Karakitsos Decl. ¶¶ 1-20) Plaintiffs now dispute the enforceability of the releases they gave.

This Action

Plaintiffs commenced this action in this Court in 1995. They seek recovery on the theory that the defendants were

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3 *See Damigos v. Flanders Compania Naviera, S.A.-Panama,* 716 F.Supp. 104, 106 (S.D.N.Y. 1989); *Kanagaratnam v. Vialogro Compania Naviera, S.A.*, No. 82 Civ. 2795(CSH), 1984 WL 735, at *3 (S.D.N.Y. Aug. 6, 1984).

negligent in sailing the MARIKA into the North Atlantic in January and in failing to keep her in good repair (am cpt ¶ 28), that she was unseaworthy (*id.* ¶ 29), and that ABS was negligent in surveying the vessel and in allowing it to sail into the North Atlantic in January (*id.* ¶ 30).[4]

Discussion

Defendants' *forum non conveniens* motion proceeds in significant part from the premise that the crux of this action is the events that occurred, or did not occur, when the MARIKA was in Piraeus in March and April 1993 for survey and repair. All of the witnesses to those events, many of whom are not parties, as well as the plaintiffs, are in Greece. The Court, they point out, cannot compel any of the non-parties to come to New York for trial, and the cost of bringing any witnesses willing to appear would be exorbitant. They rely on the forum selection and choice of law clauses in the decedents' employment contracts. They argue also that Greece has a far stronger interest in this matter than the United States, that the action is governed by Greek law, and that the Court should not needlessly undertake difficult choice of law issues that could be avoided by *forum non conveniens* dismissal.

Plaintiffs perspective, not surprisingly, is entirely different. Although tacitly conceding the centrality of the events in Piraeus and the fact that the witnesses to those events all are in Greece, they contend that the MARIKA was owned and

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4. Separate actions regarding the cargo lost with the MARIKA, brought by different plaintiffs, which had been pending before this Court have been settled.

operated by the Pappas interests–Pappas, Astron, Atlantic and Marika from a base in the New York area and flew the Liberian flag merely as a matter of convenience. They seek also to portray Pappas as an unscrupulous operator whose ships have had a dismal safety record and who seeks to hide behind a shield of foreign law. They therefore emphasize their contention that needed repairs were not made, presumably at the direction of Pappas or his New York area colleagues. They contend that U.S. law governs the matter, placing heavy reliance on *Hellenic Lines Ltd v. Rhoditis,* 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970). And they contend that the forum selection clause in the employment contracts is void under European law.

[1,2] The principles articulated in *Gulf Oil Co. v. Gilbert* 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), govern defendants' fo*rum non conveniens* motion notwithstanding that this is a maritime case in which a Jones Act claim is asserted. *Cruz v. Maritime Co. of Philippines,* 702 F.2d 47, 48 (2d Cir. 1983);[5] *Alcoa S.S. Co. v. M/V Nordic Regent* 654 F.2d 147, 153, 159 (2d Cir.), *cert denied,* 449 U.S. 890, 101 S.Ct. 248, 66 L.Ed.2d 116 (1980). The Court must make a threshold determination whether an alternative forum exists in which the case may be heard. *Eg., Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 254 n. 2, 102 S.Ct. 252, 265 n. 2, 70 L.Ed.2d 419 (1981); *see Gilbert,* 330 U.S. at 506-07, 67 S.Ct. at 842-43. Assuming there is such a forum, the Court

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5. Plaintiffs invite this Court to "reconsider" *Cruz.* It may not do so. Plaintiffs' argument would be addressed more properly to the Court of Appeals.

then must balance a series of private and public interests in determining whether to retain the case or dismiss it in favor of an alternative forum:

> "Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of the premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex', 'harass', or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiffs choice of forum should rarely be disturbed.
>
> "Factors of public interests also have a place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the

> country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." 330 U.S. at 508-09.

Availability of Alternative Forum

ABS has submitted an extensive affidavit of John D. Markianos-Daniolos, a Greek law- ...

APPENDIX F

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 94-16056 **DIVISION "J"**

ANGELINA CANTUBA, ET AL

VERSUS

THE AMERICAN BUREAU OF SHIPPING AND MITSUBISHI HEAVY INDUSTRIES, LTD.

FILED: _____ _____
DEPUTY CLERK

DECLINATORY EXCEPTIONS OF LACK OF IN PERSONAM JURISDICTION AND IMPROPER VENUE SUBMITTED ON BEHALF OF MITSUBISHI HEAVY INDUSTRIES, LTD.

MAY IT PLEASE THE COURT:

NOW INTO COURT, through undersigned counsel, comes defendant, Mitsubishi Heavy Industries, Ltd. (hereinafter "Mitsubishi"), who, with respect, moves this Court to dismiss the present suit against Mitsubishi because this Court lacks in personam jurisdiction over said defendant and the Court lacks venue in the case. Mitsubishi relies on the affidavit of Mr. Hotta attached to its motion to quash service of process. The exercise of in personam jurisdiction over

Mitsubishi is improper under both the Louisiana Long Arm Statute and the due process clause of the United States Constitution in that the grounds upon which these suits are predicated do not "arise from" any contact which Mitsubishi has had with the forum as is required by Louisiana law; nor is the exercise of in personam jurisdiction proper within the considerations of due process for the reason that Mitsubishi has not had sufficient minimum contacts with this forum, and has not affirmatively invoked the privileges and protections of this forum; nor is Mitsubishi Heavy Industries, Ltd. "doing business" in Louisiana.

Mitsubishi shows that this Court lacks venue over it since nothing involved in this ancient ship construction contract took place in Louisiana. The plaintiffs are not residents of Louisiana and the sinking of the vessel did not occur here.

For the above and foregoing reasons, the exercise of in Personam jurisdiction over Mitsubishi Heavy Industries, Ltd. would not be proper and since venue over Mitsubishi is lacking, this Court should dismiss this case against defendant, Mitsubishi Heavy Industries, Ltd.

/s/ Robert B. Acomb, Jr.
ROBERT B. ACOMB, JR., T.A. (#02304)
RICHARD D. BERTRAM (#17881)
Jones, Walker, Waechter,
Poitevent, Carrére & Denégre, L.L.P.
201 St. Charles Avenue, 48th Floor
New Orleans, Louisiana 70170-5100
(504) 582-8000
ATTORNEYS FOR DEFENDANT,
MITSUBISHI HEAVY INDUSTRIES,
LTD.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served upon all counsel of record by hand delivery and/or by depositing same in the United States mail, postage prepaid and properly addressed, this 21 day of February, 1995.

/s/ Robert B. Acomb, Jr.

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 94-16056 **DIVISION "F"**

ANGELINA CANTUBA, ET AL

VERSUS

THE AMERICAN BUREAU OF SHIPPING AND MITSUBISHI HEAVY INDUSTRIES, LTD.

FILED: _____ _____
DEPUTY CLERK

MEMORANDUM IN SUPPORT OF DECLINATORY EXCEPTIONS OF LACK OF IN PERSONAM JURISDICTION AND IMPROPER VENUE SUBMITTED ON BEHALF OF MITSUBISHI HEAVY INDUSTRIES, LTD.

MAY IT PLEASE THE COURT:

Mitsubishi, a Japanese corporation with its registered office in Tokyo, Japan, is not subject to this Court's in personam jurisdiction under Louisiana state law or federal law, and venue is improper in this case.

I. STATE LAW REGARDING IN PERSONAM JURISDICTION

. . .

III. IN LOUISIANA VENUE IS ALSO IMPROPER

It is requisite to distinguish venue from jurisdiction. Simply because a defendant may be "found" in the forum for purposes of jurisdiction does not necessarily mean that the litigation should be tried in the forum. Venue relates to a determination of the place or forum where the action should be brought. Murphee v. Mississippi Pub. Court, 149 F.2d 189 (5th Cir. 1945); International Bus. Coord., Inc. v. Aamco Auto. Trans., Inc., 305 F. Supp. 361 (S.D.N.Y. 1969). Therefore, even if this Court would find that jurisdiction over Mitsubishi is proper in this forum, which Mitsubishi strongly denies, it may still find that the forum is not proper with respect to venue.

The most pervasive criterion within the concept of venue is the doctrine of forum non conveniens. The leading authority on forum non conveniens is Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). Although Gilbert involved the issue of when one domestic forum is more convenient than another, maritime law has adopted the doctrine of forum non conveniens as espoused in Gilbert, and the courts have dismissed actions under the doctrine of forum non conveniens when they have found a foreign forum to be the proper one. Alcoa S.S. Co., Inc. v. M/V NORDIC REGENT, 654 F.2d 147 (2d Cir. 1980); Fitzgerald v. Texaco, 521 F.2d 448 (2d Cir. 1975); Pagnan Op. Consult. Int., Ltd. v. S.S. HONG KONG AMBER, 513 F.2d 667 (9th Cir. 1975); Fitzgerald v. Westland Marine Corp., 369 F.2d 449 (2d Cir. 1966); Allianz

Versicherungs v. S.S. ERKISEHIR, 334 F. Supp. 1224 (S.D.N.Y. 1971) ; Transomnia G.M.B.H. v., M.S. TORYA, 311 F. Supp. 751 (S.D.N.Y. 1970); Scherkat Tazomoni Auto. Internach v. Hellenic Lyons, Ltd., 227 F. Supp. 462 (S.D.N.Y. 1967).

A rough checklist has been established by these lower courts which have been wrestling with the issue of forum non conveniens when the issue involved is whether the most appropriate forum is a foreign one. Those contacts deemed the most important by the courts in granting a dismissal on the grounds of forum non conveniens were as follows:

1 . Nationality of plaintiffs and defendants.

2. Availability of a foreign forum.

3. Residences of witnesses and access to sources of proof.

4. Availability of compulsory process for attendance of foreign witnesses.

5. Cost of obtaining testimony of foreign witnesses.

6. Where the incident occurred.

In light of the considerations stated by the courts, it is clear that Japan would be the proper forum for purposes of venue in which to litigate this matter against Mitsubishi. The instant suit against Mitsubishi should be dismissed on the grounds of forum non conveniens because:

1. Plaintiffs involved in this claim are from the

Philippines. The defendant, Mitsubishi, is a Japanese corporation whose shipyard is in Japan.

2. The Japanese forum is available.

3. Any witnesses with regard to the construction of the vessel are residents of Japan.

4. The fact witnesses in regard to the construction of the vessel are all in Japan.

5. The accident occurred off the coast of Newfoundland, Canada.

6. The present location of the vessel is off the Newfoundland coast, thus access to it as a source of proof would be clearly more readily available in Newfoundland, Canada, than in Louisiana.

7. The costs of obtaining witnesses' testimony will be less expensive if this matter is tried in either Japan or Canada. As has already been stated, most of the witnesses and sources of proof are in either of those two locations.

The affidavit of Mr. Hotta previously attached to the Memorandum in Support of the Motion to Quash Service of Process clearly demonstrates that Japan is the proper forum for determination of the claims involved in this matter. In addition to the checklist already considered, there are several other factors which weigh heavily in favor of a dismissal of Mitsubishi from these cases on grounds of improper venue. Mitsubishi did not contract in Louisiana to construct

a vessel. None of these business entities were organized or licensed to do business in this forum. Further, all payments made pursuant to the contract were made in Japan in Japanese yen.

IV. CONCLUSION

Plaintiff has sought to invoke the jurisdiction of this Court and, therefore, have the burden of establishing that in personam jurisdiction exists. Clearly, under the facts of this case, such jurisdiction does not exist and the laws of Louisiana do not confer jurisdiction over the person of Mitsubishi for the reason that this suit does not arise out of Mitsubishi's transacting business within Louisiana. Further, any slight contacts of Mitsubishi with Louisiana are so insubstantial and minimal that the assertion of jurisdiction over the Japanese corporation does not purport with either the statutory requirements of the Louisiana Long Arm Statute or the basic due process requirements of the United States Constitution.

Mitsubishi further shows that this Court lacks venue over it in Louisiana.

For the above stated legal. and factual reasons, it is respectfully requested that this Court dismiss this suit against Mitsubishi for lack of in personam jurisdiction and for lack of venue.

Respectfully submitted,

/s/ Robert B. Acomb, Jr.
ROBERT B. ACOMB, JR., T.A. (#02304)
RICHARD D. BERTRAM (#17881)
Jones, Walker, Waechter,
Poitevent, Carrére & Denégre, L.L.P.
201 St. Charles Avenue, 48th Floor
New Orleans, Louisiana 70170-5100
(504) 582-8000
ATTORNEYS FOR DEFENDANT,
MITSUBISHI HEAVY INDUSTRIES,
LTD.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served upon all counsel of record by hand delivery and/or by depositing same in the United States mail, postage prepaid and properly addressed, this 21 day of February, 1995.

/s/ Robert B. Acomb, Jr.

APPENDIX G

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 94-16056 **DIVISION "J"**

ANGELINA CANTUBA, ET AL

VERSUS

THE AMERICAN BUREAU OF SHIPPING
AND MITSUBISHI HEAVY INDUSTRIES, LTD.

CONSOLIDATED WITH

NO. 95-19198 **DIVISION "K"**

MARILYN ALBA DEAN, ET AL

VERSUS

THE AMERICAN BUREAU 0F SHIPPING, ET AL

FILED: _____ **_____**
DEPUTY CLERK

EXCEPTIONS OF MITSUBISHI HEAVY
INDUSTRIES, LTD.
OF NO RIGHT OF ACTION AND TO DISMISS THE
PETITION ON THE GROUND OF FORUM NON
CONVENIENS

NOW INTO COURT, through undersigned counsel, comes Mitsubishi Heavy Industries, Ltd. (hereinafter "MHI"), who respectfully submits that the Jones Act, General Maritime law, state law, and foreign law claims of plaintiffs, Marilyn Alba Dean and others (hereafter Philippines plaintiffs), should be dismissed on the exceptions of No Right of Action, C.C.P. 927(5) because such causes of action are not available to the Philippines plaintiffs pursuant to the express dictates of Section (b) of the Jones Act, 46 U.S.C. §688(b) and under the general maritime law of the United States. Alternatively, the petition in the above captioned and numbered matter should be dismissed on the ground of forum non conveniens because the matter involves claims governed solely by Greek or other foreign law, by Philippines citizens who are nonresident aliens, and employees of a Greek corporation, for claims allegedly resulting from the January 1, 1994 sinking of a Liberian flagged vessel, the MARIKA 7, on the high seas off the coast of Canada and because the forum selected by the Philippines plaintiffs is not convenient to any party and there exists an available, adequate, and more appropriate forum in Greece where law claims applicable to this controversy can be heard and resolved.

WHEREFORE, defendant, MHI, prays that its exception of no right of action be maintained and that the Philippines plaintiffs Jones Act, General Maritime Law, state law, and foreign law claims be dismissed; alternatively, that the above captioned and numbered matter should be dismissed on the ground of forum non conveniens, all as more fully set forth in the attached memorandun.

/s/ Robert B. Acomb, Jr.,
ROBERT B. ACOMB, JR., T.A. (#02304)
JAMES E. WRIGHT, III (#13700)
RICHARD D. BERTRAM (#17881)
Jones, Walker, Waechter,
Poitevent, Carrére & Denégre, L.L.P.
201 St. Charles Avenue, 48th Floor
New Orleans, Louisiana 70170-5100
(504) 582-8000

ATTORNEYS FOR DEFENDANT MIT-
SUBISHI HEAVY
INDUSTRIES, LTD.

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 27 day of November, 1996 served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States mail, properly addressed, and first class postage prepaid.

/s/ Robert B. Acomb

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 94-16056 **DIVISION "J"**

ANGELINA CANTUBA, ET AL

VERSUS

THE AMERICAN BUREAU OF SHIPPING
AND MITSUBISHI HEAVY INDUSTRIES, LTD.

CONSOLIDATED WITH

NO. 95-19198 **DIVISION "K"**

MARILYN ALBA DEAN, ET AL

VERSUS

THE AMERICAN BUREAU 0F SHIPPING, ET AL

FILED: _____ _____
DEPUTY CLERK

MEMORANDUM IN SUPPORT OF EXCEPTIONS OF MITSUBISHI HEAVY INDUSTRIES, LTD. OF NO RIGHT OF ACTION AND TO DISMISS THE PETITION ON THE GROUND OF FORUM NON CONVENIENS

The petition in the above captioned matter does not allege or assert that the Dean claimants (hereinafter the Philippines plaintiffs) have no remedy under foreign law. The exceptions of the defendant suggest the existence of a remedy for the Philippines plaintiffs under either Philippines or Greek law. Olin v. Tidewater. Inc., 897 F.Supp 968, 971 (S.D.Tex. 1995).

The claims now asserted here on behalf of the Philippines plaintiffs under the general maritime law or foreign law must be dismissed because these plaintiffs are attempting to proceed in state court where the doctrine of forum non conveniens mandates that the local court lacks jurisdiction to proceed to trial.

Further, the Philippines plaintiffs have no claim under Louisiana law. Jackson v. S.P. Leasing Corp., 774 S.W.2d 673 (Tex. App. Texarkana 1989); Lawrenson v. Global Marine. Inc., 869 S.W.3d 519 (Tex. App. Texarkana 1993). A state law claim or "other law" claim may not be afforded to the Philippines plaintiffs where the jurisprudence specifically proscribed a different remedy. Miles v. Apex Marine Corp., 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990) ; Gillespie v. United States Steel Corp., 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964) ; Lindgren v. United States, 281 U.S. 38, 50 S.Ct. 207, 74 L.Ed. 686 (1930). See also, Antill v. Public Grain Elevator of New Orleans. Inc., 577 So.2d 1039 (La. App. 4th Cir. 1991).

Based upon the above and foregoing, it is evident that the Philippines plaintiffs are within the class that should litigate in another court and, accordingly, the defendants exception of no right of action is the appropriate threshold procedural device upon which to dismiss their claims here.

Significantly, United States courts dismissing on forum non conveniens ground in favor of litigation in Greece have consistently found that the law of Greece provides an adequate alternative forum. In Ioannides v. Marika Maritime Corporation, 928 F.Supp. 374 (S.D.N.Y. 1996), the federal court correctly ruled that dismissal on the ground of forum non conveniens was proper for the claims of other plaintiffs surviving from the same sinking. The court noted in its opinion:

> There is a final public interest consideration that bears more than passing mention. This is a case brought on behalf of Greek seamen who sipped aboard a Liberian vessel crewed by a Greek company which, wherever its ownership lay, was engaged exclusively in carrying cargos to and from non-U.S. ports. There are fora and remedies available to plaintiffs under the law of their country of domicile. Three of them already have settled their claims for sums which are substantial, even if they perhaps might seem low by American standards. There seems little justification for opening the courts of the United States --which are paid for by U.S. taxpayers and whose juries are composed of U.S. citizens asked to drop their everyday activities to serve - - to claims in these circumstances even if, as plaintiffs stoutly argue, the ultimate base of operations of the vessel in question was the United States. That no doubt is why judges of this Court repeatedly have dismissed cases like this one — all brought by the same attorney — in favor of Greek fora. E.G., Damigos, 716 F.Supp. 104; Tsangaris v. Elite Inc., No. 92 Civ. 7855(RPP), 1993 WL 267425 (S.D.N.Y.

.July 9, 1993); Geralis v. Westwind Africa Line. Ltd., No. 84 Civ. 4310(DNE) (S.D.N.Y. Apr. 19, 19891); Hasakis v. Trade Bulkers, Inc., 690 F.Supp. 260 (S.D.N.Y. 1988); Kassapas v. Arkon Shipping Agency, Inc., 578 F.Supp. 400 (S.D.N.Y. 1984); Doufexis v. Nagos S.S., Inc., 583 F.Supp. 1132 (S.D.N.Y. 1983); Krimizis v. Panoceanic Navigation Corp., No. 83 Civ. 5667 (JFK), 1985 WL 3834 (S.D.N.Y. Nov. 14, 1985).

928 F.Supp. AT 380.

As Judge Bagneris recognized in his opinion in the attached case of Coto v. J. Ray McDermott, Inc., CA 95-16491 c/w 96-354, the foreign plaintiffs have no claim or right of action under Louisiana law or foreign law for the sinking of a foreign vessel in waters off the Coast of Mexico. Boeing, 806 F.Supp. at 143; Tonkon v. Denny's Inc., Civ. A. No. 860-1186, 1987 WL 8837, at *2 (E.D.Pa. March 31, 1987), aff'd, 835 F.2d 284 (3d Cir. 1987); Diaz v. Mexicana de Avion S.A., No. SA-86-CA-1065, 1987 WL 275695, at **1-3 (W.D.Tex. Jan. 23, 1987), aff'd, 843 F.2d 498 (5th Cir.), cert. denied, 488 U.S. 826 (1988); see also, Olin v. Tidewater, Inc., 897 F.Supp. 968, 970-71 (S.D.Tex. 1995) (Honduran seaman had remedies for his injuries in Mexico) . In sum, the Philippines and/or Greece system provides everything the Philippines plaintiffs need for a fair hearing of their claims and a just adjudication of their rights. Louisiana has nothing to do with this dispute.

/s/ Robert B. Acomb, Jr.
ROBERT B. ACOMB, JR., T.A. (#02364)
JAMES E. WRIGHT, III (#13700)
RICHARD D. BERTRAM (#17881)
Jones, Walker, Waechter,
Poitevent, Carrère & Denègre, L.L.P.
201 St. Charles Avenue, 48th Floor
New Orleans, Louisiana 70170-5100
(504) 582-8000

ATTORNEYS FOR DEFENDANT MITSUBISHI HEAVY
INDUSTRIES, LTD.

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 27 day of November, 1996 served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States mail, properly addressed, and first class postage prepaid.

/s/ Robert B. Acomb

APPENDIX III

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 96-[illegible] DIVISION "[illegible]"

ANGELINA CANTUBA, ET AL.

VERSUS

THE AMERICAN BUREAU OF SHIPPING
AND MITSUBISHI HEAVY INDUSTRIES, LTD.

FILED: _____ _____
DEPUTY CLERK

EXCEPTIONS OF IMPROPER VENUE,
NO CAUSE OR RIGHT OF ACTION
AND
MOTION TO DISMISS
FOR FORUM NON CONVENIENS

NOW INTO COURT, through undersigned counsel, comes Mitsubishi Heavy Industries, Ltd., ("MHI") Defendant in the above referenced and numbered action, who hereby excepts on grounds of improper venue, no cause or right of action, and forum non conveniens, in response to the Second Amended and Supplemental Petition filed herein on behalf of Plaintiffs, Angelina Cantuba and others ("Philippine Plaintiffs"), all other Petitions, in Civil Action No. 96-[illegible],

MHI respectfully submits that the instant case has nothing to do with Louisiana, and that the general maritime law, the Jones Act and state law afford no relief to Plaintiffs in this Court;

Louisiana Code of Civil Procedure Article 123(C) is not a bar to a dismissal for forum non conveniens dismissal because the Jones Act and federal maritime law are inapplicable to this case;

The foreign law claims of the Plaintiffs should be dismissed on grounds that venue is improper and on grounds that there is no right of action under CCP Art. 927(5) because such causes of action are not available to the Philippine Plaintiffs under the Jones Act, or general maritime law of the United States;

The uncontested facts and allegations of the Petition show that there are claims by Philippine citizens who are non-resident aliens of the United States, whose decedents were employees of a Greek corporation, for claims allegedly resulting from the January 1, 1994 sinking of a Liberian flagged vessel, the M/V MARIKA 7, on the high seas off the coast of Canada and because the forum selected by the Philippine Plaintiffs is not convenient to any party and there exists an available, adequate, and more appropriate forum in Greece and/or the Philippines where law claims applicable to this controversy can be heard and resolved.

WHEREFORE, Defendant Mitsubishi Heavy Industries, Ltd. prays that the foregoing exceptions be maintained and that all Petitions filed herein on behalf of the Plaintiffs be dismissed, with prejudice, as set forth more fully in the attached memorandum.

Respectfully submitted,

/s/ Robert B. Acomb, Jr.
ROBERT B. ACOMB, JR., T.A. (#02304)
JAMES E> WRIGHT, III (#13700)
Jones, Walker, Waechter,
Poitevent, Carrére & Denégre, L.L.P.
201 St. Charles Avenue, 48th Floor
New Orleans, Louisiana 70170-5100
(504) 582-8000

ATTORNEYS FOR DEFENDANT,
MITSUBISHI HEAVY INDUSTRIES,
LTD.

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 13th day of January, 1997 served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States mail, properly addressed, and first class postage prepaid.

/s/ Robert B. Acomb, Jr.

APPENDIX I

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 94-16056 SECTION "13" DIVISION "J"

ANGELINA CANTUBA, ET AL

VERSUS

THE AMERICAN BUREAU OF SHIPPING
AND MITSUBISHI HEAVY INDUSTRIES, LTD.

FILED: _____ _____
DEPUTY CLERK

JUDGMENT

This matter came on for hearing of exceptions filed by defendant Mitsubishi Heavy Industries, Ltd. Present in court were:

Charles B. Colvin, Esq.
RANDY J. UNGAR & ASSOCIATES, INC.
111 Rue Iberville Street - Suite 400
New Orleans, Louisiana 70130
Attorney for Plantiffs

Mr. Jim Wright, Esq.
201 St. Charles Avenue
New Orleans, LA 70170-5100
Attorney for Defendants

After considering the arguments of counsel, the memoranda, and all other premises:

IT IS ORDERED, ADJUDGED AND DECREED that the exceptions of improper service, improper venue, no cause of action, and lack of personal jurisdiction are overruled.

New Orleans, Louisiana, this 1st day of February, 1996.

/s/ George Connolly, Jr.
JUDGE, CIVIL DISTRICT COURT

Respectfully submitted,
RANDY J. UNGAR & ASSOCIATES, INC.

Randy J. Ungar # 12387
George W. Byrne, Jr. #3744
Charles B. Colvin #4352
111 Rue Iberville
Suite 400
New Orleans, Louisiana 70130
(504) 566-1616

APPENDIX J

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 94-16056 SECTION "13" DIVISION "J"

ANGELINA CANTUBA, ET AL

VERSUS

THE AMERICAN BUREAU OF SHIPPING
AND MITSUBISHI HEAVY INDUSTRIES, LTD.

FILED: _____ _____
DEPUTY CLERK

JUDGMENT

This matter came on for hearing of exceptions of No Cause or Right. of Action and Improper Venue, and of a Motion to Dismiss for Forum Non Conveniens.

Present were:

Mr. Randy J. Ungar
Mr. Charles B. Colvin
RANDY J. UNGAR & ASSOCIATES,
365 Canal Street, Suite 2030
New Orleans, LA 70130
Attorneys for Plaintiffs

Mr. Robert B. Acomb, Jr.
Mr. James E. Wright, III.
Mr. Richard Bertram
201 St. Charles Avenue
New Orleans, LA 70170-5100
Attorneys for Mitsubishi Heavy Industries, Inc.

After hearing the arguments of counsel and considering the pleadings and all other particulars,

IT IS ORDERED, ADJUDGED AND DECREED that the exceptions of No Cause or Right of Action and Improper Venue are overruled.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss for Forum Non Conveniens is denied.

New Orleans, Louisiana, this 25th day of Feb. 1997.

/s/ illegible
JUDGE, CIVIL DISTRICT COURT

APPENDIX K

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 94-16056 SECTION "13" DIVISION "J"
c/w95-19198
c/w96-21561
c/w97-70

ANGELINA CANTUBA, ET AL

VERSUS

THE AMERICAN BUREAU OF SHIPPING
AND MITSUBISHI HEAVY INDUSTRIES, LTD.

FILED: _____ _____
DEPUTY CLERK

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO COMPLY WITH COURT ORDER COMPELLING FULL ANSWERS TO INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

MAY IT PLEASE THE COURT:

The vessel MARIKA sank in the North Atlantic on January 1, 1994. These consolidated cases were filed in this Court on behalf of the Greek officers and Philippine crew in April 1994.

This is the fourth time over a 20-month period that the issue of plaintiffs' failure to properly respond to the interrogatories and requests for production propounded by Mitsubishi Heavy Industries, Ltd. (hereinafter "MHI") to plaintiffs in April and May 1997 has been brought to the Court's attention. After failing to comply with this Court's judgement entered on November 14, 1997 requiring the plaintiffs to "serve complete responses to interrogatories and requests for production of documents propounded by Mitsubishi Heavy Industries," MHI has been attempting to obtain plaintiffs compliance with that order for over a year. Once again the plaintiffs have failed to comply with this Court's order of September 3, 1998 wherein the Court granted MHI's Motion to Compel and ordered each plaintiff to fully answer the interrogatories and to produce the documents requested, as prayed for in the motion of MHI. In the order, the Court further ordered that each plaintiff must identify the documents which are responsive to a particular interrogatory answer and/or request for production. The Court gave the plaintiffs 15 days from the date of the order or until September 18 to comply with the order. No plaintiff has complied with the Court's order.

HISTORY

A history of MHI's efforts to obtain proper discovery answers from plaintiffs started in April 1997 when the discovery requests were originally filed. The refusal of plaintiffs to answer illustrates the frustration of MHI in attempting to obtain information to which the law states it is entitled. That history is as follows:

1.) Plaintiffs filed their first suit in April 1994 for an accident which occurred on January 1, 1994.

2.) MHI propounded interrogatories and requests for production of documents to the numerous plaintiffs in the four consolidated cases by mailing same to plaintiffs' counsel as follows:

A. On April 3, 1997, MHI propounded interrogatories and requests for production of documents to all plaintiffs in the *Cantuba* case, Civil Action No. 94-16056, Section 13, Division J, consolidated with *Dean,* Civil Action No. 95-19198;

B. On May 5, 1997, MHI propounded interrogatories and requests for production of documents to all plaintiffs in the *Dean* case, Civil Action No. 95-19198, consolidated with *Cantuba,* Civil Action No. 94-16056, Section 13, Division J;

C. On May 22, 1997, MHI propounded interrogatories and requests for production of documents to all plaintiffs in the *loannides* case, Civil Action No. 96-21561, Division 8-N, Docket No. 4; and

D. On August 12, 1997, MHIi propounded interrogatories and requests for production of documents to all plaintiffs in the *Silva* case, Civil Action No. 97-70, Section 16, Division M.

3.) At the May 27, 1997 status conference held before the Honorable Louis M. DiRosa, there was a discussion that the interrogatories and requests for production had

not yet been answered by plaintiffs. Counsel for plaintiffs verbally stated at that time that all answers would be forthcoming within 30 days from the date of that conference.

4.) Since nothing was received from the plaintiffs, on September 26, 1997. counsel for MHI scheduled a Rule 9, Section 4 conference for October 7, 1997, at 10:00 am. to discuss the unanswered discovery with plaintiffs' counsel.

5.) The conference of October 7 was rescheduled at the request of plaintiffs' counsel for October 17, 1997, at 9:00 am. However, no one from plaintiffs counsel's office appeared at the conference on October 17, 1997.

6.) On October 17, 1997, MHI filed its first motion to compel responses to its interrogatories and requests for production of documents. That motion was scheduled for hearing on November 7, 1997 and was submitted to the Court without argument.

7.) On November 14, 1997, Judge DiRosa issued a judgment ordering the plaintiffs to serve complete responses to MHI's interrogatories and requests for production within 30 days of November 14, 1997. (See attached Exhibit 1.)

8.) On December 15, 1997, plaintiffs' counsel delivered partial responses to MHI's interrogatories and requests for production of documents.

9.) After reviewing plaintiffs' responses, counsel for MHI forwarded correspondence on February 17, 1998 to counsel for plaintiffs setting forth in detail the deficiencies in plaintiffs' answers to interrogatories and responses to

requests for production of documents as to each plaintiff in the four consolidated cases. (See attached Exhibit 2.) In that letter counsel for MHI called for a Rule 9, Section 4 conference to confer with plaintiffs' counsel regarding the deficient answers to interrogatories and responses to requests for production.

10.) On March 4, 1998, a face-to-face conference was held between counsel for MHI and plaintiffs at Mr. Ungar's office to discuss the deficient discovery responses of plaintiffs. At that time, Mr. Ungar advised that he did not handle the interrogatories but he relied on a Houston paralegal. Mr. Ungar thought they had funished MHI the information in their possession and that other information requested had not been received by them. He also advised that the paralegal from their Houston law firm would be flown over to New Orleans within a matter of a few days to complete the answers and produce the documents. This agreement was confirmed in the letter of MHI's counsel dated March 12, 1998. (See attached Exhibit 3.)

11.) On March 6 and 10, 1998, plaintiffs' counsel produced additional documents which were a March 6, 1998 legal opinion by Paras, Raynes & Manlapaz setting forth contentions of Philippine law with regard to the personal representative of a decedent and copies of 22 classified ads from a Filipino newspaper dated November 21, 1997.

12.) On March 31, 1998 plaintiff's' counsel forwarded a letter addressing only a small part of the deficiencies set forth by MHI. The deficiencies which were addressed by plaintiffs' counsel related only to the reasons that several plaintiffs did not provide answers to interrogatories. (See attached Exhibit 4.)

13.) On April 16, 1998, counsel for MHI again wrote to plaintiffs'' counsel stating that responses had not been received to MHI's assertions of deficiencies in plaintiffs' discovery responses. (See attached Exhibit 5.)

14.) On May 13, 1998, MHI filed a motion to compel complete responses to interrogatories and requests for production of documents. That motion was MHI's second motion relative to plaintiffs' deficient discovery responses and was scheduled for hearing for June 3, 1998.

15.) On June 2, 1998, the day before the hearing, plaintiffs' counsel contacted counsel for MHI stating that they were unable to be present at the hearing of the motions because of an emergency and needed an additional two weeks in which to prepare. Counsel for MHI agreed for a postponement of two weeks and MHI's motion was reset with the Court for June 19, 1998.

16.) On June 19, 1998, a hearing on MHI's motion to compel was heard before this Court. The Court requested that counsel for all parties step outside to discuss possible resolution of the motion. After conferring in the hallway, all counsel advised the Court that there was an agreement to have a face-to-face meeting within the next week to attempt to resolve the discovery issues. (See attached Exhibit 6.) The motions to compel were postponed to be reset for hearing if necessary. This agreement was confirmed by letter dated June 19, 1998. (See attached Exhibit 7.)

17.) On July 13 and 15, 1998, counsel for all parties conferred at Mr. Ungar's office to attempt to resolve the discovery issues raised by MHI's motion. At the conferences,

several verbal agreements were made on the pending issues and it was agreed that a letter agreement setting forth the understandings would be helpful.

18.) On July 16, 1998, a draft agreement was prepared and circulated, (See attached Exhibit 8)

19.) On July 17, 198, plaintiff's' counsel proposed one amendment to the draft agreement which change was incorporated. Plaintiffs' counsel was the only party to request any changes. (See attached Exhibit 9.)

20.) After plaintiffs' changes were incorporated into the letter, Mr. Ungar refused to execute the agreement and proposed additional changes which were different than the verbal agreements made at the July meeting and, therefore, were unacceptable to MHI. (See attached Exhibit 10.)

21.) On August 28, 1998, MHI's motion again came on for hearing before this Court. After hearing the argument of counsel, the Court granted MHI's motion to compel. After the hearing, counsel for MHI forwarded the proposed order which was being submitted to the Court to all counsel in this case for comment. No objection was received from counsel for plaintiffs.

22.) On September 3,1998, the Court signed the order granting MHI's motion to compel ordering each plaintiff to answer fully the interrogatories and produce the documents requested as prayed for in MHI's motion. In addition, the Court ordered that each plaintiff must identify the documents which were responsive to a particular interrogatory answer and/or response to request for production. The order

gave the plaintiffs 15 days or until September 18, 1998 to comply. (See attached Exhibit 11.)

23.) When no responses were received, counsel for MHI wrote to plaintiffs' counsel on October 1, 1998 advising plaintiffs' counsel that more than 15 days had elapsed since the date of the entry of the order and requested advice on when plaintiffs would forward amended responses in compliance with the order. (See attached Exhibit 12.)

24.) No response was received from plaintiffs' counsel until October 19, 1998 when plaintiffs' counsel left a voice mail message stating that plaintiffs' counsel had not seen the Judge's order compelling discovery. As counsel for MHI was out of town at that time, the secretary for MHI's counsel sent a letter to plaintiff's counsel forwarding a copy of the August 28 letter submitting the order to judge Ramsey as well as a copy of the order signed by Judge Ramsey and the letter of October 1. (See attached Exhibits 11, 12 & 13.) Again no response was received from plaintiff's counsel.

25.) In view of the continued lack of response from Plaintiffs' counsel, MHI sent a letter to plaintiffs, counsel on November 10, 1998 scheduling a Rule 9, Section 4 discovery conference for November 13, 1998 to discuss plaintiff's lack of compliance with the Court order issued on September 3, 1998. (See attached Exhibit 14.)

26.) On November 11, 1998, the Rule 9, Section 4 conference was held between counsel for MHI and plaintiffs' counsel by telephone to discuss the plaintiffs' failure to comply with the Court order of September 3, 1998. Plaintiffs' counsel stated that she had requested an extension of time

from counsel of MHI by leaving a phone message. However, counsel of MHI advised that he received no such request for an extension on his voice mail and would not have granted one anyway in view of the fact that the order had been entered over two months previously and had been completely ignored by plaintiffs. Counsel for plaintiffs requested an extension until after Thanksgiving to provide responses. Counsel for MHI advised that since MHI has been waiting over one and one-half years for proper responses, further extensions could not be granted.

27.) As Of the date of the filing of this motion on December 17, 1998, more than two weeks after Thanksgiving, plaintiffs have still failed to comply with the Court order compelling answers to interrogatories and responses to request for production. . . .

Supreme Court, U.S.
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No. 02-189

In The
Supreme Court of the United States

MITSUBISHI HEAVY INDUSTRIES, LTD.,

Petitioner,

versus

ANGELINA CANTUBA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal, Fourth Circuit Of The State Of Louisiana

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PARTIES TO THE PROCEEDING

In addition to the parties listed by Petitioners as being named by Plaintiffs as Defendants in this case, it should be noted that the parties in question, namely the American Bureau of Shipping, Ltd., the Salvage Association, Ltd. and Paul Francis Daniels are still parties to the proceedings; however, only the Petitioner, Mitsubishi Heavy Industries, Ltd., is bringing this Petition for a Writ of Certiorari. The remaining parties, the American Bureau of Shipping, Ltd., the Salvage Association, Ltd. and Paul Francis Daniels are currently scheduling depositions during the month of November, 2002 of the Plaintiffs in the objected to forum, Orleans Parish.

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REASONS FOR DENYING THE WRIT

I. PETITIONER HAS FAILED TO SHOW THAT AN ALTERNATIVE AVAILABLE FORUM EXISTS

Petitioner, Mitsubishi Heavy Industries, Ltd. (hereinafter "MHI"), has not met the requirement of demonstrating the existence of an adequate alternative forum. There is compelling authority for the proposition that the mover in *forum non conveniens* has an absolute burden to prove that there is an adequate available forum where all Defendants are amenable to jurisdiction and where Plaintiffs can reasonably prosecute their case. Respondents cite Wright, Miller & Cooper, *Jurisdiction* §3828:

> Dismissal on the basis of *forum non conveniens* requires that there be in fact an alternative forum in which suit can be maintained. The doctrine of *forum non conveniens* presupposes at least two forums, in which defendant is amenable to process.

Case citations indicating the mandatory nature of this demonstration include:

> *Gulf Oil Corp. v. Gilbert*, 67 S. Ct. at 842, 330 U.S. 506-507; *Turan v. Universal Plan Inv. Ltd.*, 70 F. Supp. 671 (E.D. La. 1999); *Perusahaan Umum Listrik Negara Pusat v. M/V TEL AVIV*, 711 F.2d 1231, 1238 (5th Cir 1983); *Watson v. Merrell Dow Pharmaceuticals, Inc.*, 769 F.2d 354 (6th Cir. 1985); *Denmark v. Tzimas*, 871 F. Supp. 261 (E.D. La. 1994); *Menendez Rodriguez v. Pan American Life Insurance Co.*, 311 F.2d 429 (5th Cir. 1962); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668 (U.S. App. D.C. 1996); *Mercier v. Sheraton Intern, Inc.*, 981 F.2d 1345 (5th Cir. 1992).

It is the indispensable burden of the mover, then, to demonstrate the existence of an adequate alternative forum. As this is not done in this case, the motion to dismiss for *forum non conveniens* lacked the requisite foundation and both the Louisiana Fourth Circuit Court of Appeal and Louisiana Supreme Court recognized this fact.

Nowhere has MHI ever claimed that it has made the requisite showing of adequate available forum. This essential requirement of any *forum non conveniens* motion was and still is missing.

The Louisiana Fourth Circuit Court of Appeals and the Louisiana Supreme Court could not legitimately find the existence of an adequate, available forum where there was no evidence presented of same. Second, a finding of so-called "appropriate" *fora* is not what is mandated by law. The mover in a *forum non conveniens* motion must show adequate, available *fora* where all Defendants are amenable to process and the Plaintiffs have an opportunity to proceed. "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which defendant is amenable to process. . . . " *Gulf Oil Corp. v. Gilbert, supra*, at 506-507. This was not done in this case. A list of no less than four nations in which Defendant MHI speculates suit might be brought is insufficient.

The availability and adequacy of the proposed alternative forum must be proved either by affidavit or in some other competent fashion. Petitioner, MHI, has suggested that the substantive law of the foreign forum is presumed to be adequate, but this does not relieve Petitioner of its burden of proof as to particular proposed tribunals. Mover in a Motion to Dismiss for *forum non conveniens* cannot

simply toss out four nations where it imagines suit would be possible. In *Vaz Borralho v. Keydril Co.*, 696 F.2d 379 (5th Cir 1983), the United States Fifth Circuit Court of Appeals cited *Piper Aircraft Company v. Reyno*, 454 U.S. 235 (1981) for the following proposition:

> "Ordinarily, this requirement [of showing an alternative forum] will be satisfied when the defendant is 'amenable to process' in the other jurisdiction."
>
> (696 F.3d at 391)

This has never been accomplished by MHI. In particular, with respect to Defendant, Paul Francis Daniels, a Louisiana domiciliary, there is no showing that he is amenable to process in any of the four proposed forum nations, namely Canada, Japan, Greece or the Philippines. This problem has never been addressed by MHI. Mr. Daniels is not amenable to process in these other nations' courts and it is MHI's burden to meet the challenge of showing that there is the requisite jurisdiction over Mr. Daniels, as a necessary party to this litigation, in an alternative forum.

There is no stipulation in the record from Mr. Daniels that he would submit voluntarily to the jurisdiction of a court in Japan, Greece, the Philippines or Canada. Generally the conditions a defendant must follow are:

(1) consent to the jurisdiction of the foreign court;

(2) the foreign court must in fact exercise jurisdiction;

(3) agree to satisfy judgment by the foreign court;

(4) waiver of statute of limitations;

(5) agree to facilitate discovery;

(6) translation of documents;

(7) make witnesses available to the action in the foreign jurisdiction.

See, Wright, Miller, Cooper, *Jurisdiction* §3828, pp. 288-289, n. 34.

These requirements remain unsatisfied. MHI has not and cannot assert that all Defendants in this matter will agree to the terms enumerated above. It is Defendant's burden "to show that there is another existing forum and that this is actually so and not merely theoretically." Wright, Miller, Cooper, *supra*, at *Jurisdiction*, §3828, p. 290, n. 35, citing *Menendez Rodriguez v. Pan American Life Ins. Co.*, 311 F.2d 429 (5th Cir. 1962). Although MHI submitted a judgment for the trial judge to sign which listed four allegedly "appropriate" nations in which suit might be brought, this action alone is clearly insufficient to meet MHI's burden of proof.

Paul Francis Daniels has been a Defendant in this matter since the outset. Mr. Daniels is still in the case and will remain as a Defendant. Mr. Daniels is also a Louisiana domiciliary. He performed the last inspection on the vessel (in Brazil) before it sank. He is not amenable to service in the nations of Japan, Greece, the Philippines or Canada. He has not agreed to submit to the jurisdiction of the courts of those nations.

Mr. Daniels was added as a Defendant along with the Salvage Association, Ltd., and both are *bona fide* Defendants. Since Mr. Daniels is not amenable to process in Canada, the Philippines, Greece or Japan, and does not submit himself to same, these are not available, adequate

fora as to all Defendants. In fact, the American Bureau of Shipping, Ltd., the Salvage Association, Ltd. and Paul Francis Daniels are currently scheduling depositions of the Plaintiffs in the objected to forum, Orleans Parish, and have not joined in this Petition for a Writ of Certiorari.

LSA – C.C.P. art. 42 states: "An action against an individual who is domiciled in the state shall be brought in the parish of domicile. . . . " *Forum non conveniens* does not apply. Petitioner conveniently overlooks the fact that Mr. Daniels is local and that suit against a Louisiana resident must be brought in his own domicile. *Fidelity Deposit Co. v. Bussa*, 22 So. 2d 562 (La. 1945).

Because one of the main Defendants is a Louisiana domiciliary, Louisiana has a vital interest in this litigation, and there is a sound reason for keeping it there. With a Louisiana Defendant in a case, Louisiana's courts have a substantial reason to preside over its disposition. In *Fox v. Board of Supervisors*, 559 So. 2d 850 (La. App. 1st Cir. 1990), the Louisiana First Circuit Court of Appeal noted: " . . . since no Louisiana residents are involved in the litigation, the interest of the Louisiana judicial system in the litigation is slight." In the case at bar, Louisiana has a major interest in retaining the case and should do so.

The Defendant bears the burden of persuasion on all elements of the *forum non conveniens* claim. *Nolan v. Boeing*, 762 F. Supp. 680 (E.D. La. 1989). It is Defendant's burden to demonstrate that there is a more convenient forum available to accept the litigation. Without this affirmative demonstration, the motion to dismiss must fail. But, according to the Fifth Circuit, "A foreign forum is available when the entire case and all parties can come within the jurisdiction of that forum." 821 F.2d at 1164.

See also, *Turan v. Universal Plan Inv. Ltd.*, 70 F. Supp. 2 671 (E.D. La. 1999).

According to Wright Miller & Cooper, *Jurisdiction* §3828:

> "Dismissal on the basis of *forum non conveniens* requires that there be in fact an alternative forum in which suit can be maintained. The doctrine of *forum non conveniens* presupposes at least two forums, in which defendant is amenable to process."

See, *Gulf Oil Corp. v. Gilbert*, 67 S. Ct. at 842, 330 U.S. 506-507.

A *forum non conveniens* dismissal should never be granted unless the Defendant can satisfy the Court that an adequate and available alternative forum exists. See *Perusahaan Umum Listsik Negara Pusat v. M/V TEL AVIV*, 711 F.2d 1231, 1238 (5th Cir. 1983).

Dismissal predicated on *forum non conveniens* requires availability of an alternative forum possessing jurisdiction as to all parties. *Watson v. Merrell Dow Pharmaceuticals, Inc.*, 769 F.2d 354 (6th Cir. 1985). "This requirement is generally satisfied if the defendant is amenable to process in the foreign jurisdiction." *Denmark v. Tzimas*, 871 F. Supp. 261 (E.D. La. 1994).

This Court will read the Petition for a Writ of Certiorari in vain for any argument by MHI that Defendant, Paul Francis Daniels, is amenable to process or under the jurisdiction of any tribunal in Canada, Japan, Greece or the Philippines. Mr. Daniels inspected the vessel in Brazil. It was the last inspection thereof and is of critical importance. The inspection in Brazil does not create jurisdiction

in any of the places proposed by MHI as alternative courts. Because MHI fails to demonstrate that Defendant, Daniels, is within the jurisdiction of these courts and amenable to process as such, there is no requisite showing of an alternative available forum. In *Menendez Rodriguez v. Pan American Life Ins. Co.*, 311 F.3d 429 (5th Cir. 1962), the Fifth Circuit, as a corollary to the doctrine, announced in *Gulf Oil Corp. v. Gilbert, supra*, that:

> "At least two such forums must be open to the plaintiff before the doctrine comes into play; and they shall not be dependent merely upon the will or grace of the defendant, but must be provided by law."

This means that even if Defendant, Daniels, were willing to submit to jurisdiction in a forum proposed by MHI, unless he were amenable to service of process and jurisdiction in that place there would be no alternative forum under the rule of *Gulf Oil Corp. v. Gilbert*. MHI does not and cannot show that a Louisiana Defendant would be amenable to suit in the *fora* proposed. The stipulation under LSA – C.C.P. art. 123(C) provides merely that the Defendants "shall waive any defense based upon prescription or the statute of limitation that has matured since the commencement of this action. . . . " (See Petition for a Writ of Certiorari at A-4). It does not require a Defendant to consent to jurisdiction or service of process. Moreover, Petitioner has made no showing that the same rights to a trial by jury and to be fully compensated for all damages are available in any of the suggested alternative *fora*.

II. PETITIONER WAIVED ITS RIGHT TO ASSERT THE DEFENSE OF *FORUM NON CONVENIENS*

Petitioner, MHI, concedes that it could have filed its motion to dismiss under the new law on June 30, 1999, but delayed until November 2, 2000. MHI argues that this delay is acceptable, and that its filing of motions in the trial court over the period of this sixteen month interim does not constitute a waiver of venue and acquiescence in the jurisdiction of the court. MHI cites various discovery issues during the pertinent time period as the excuse for its failure to timely file a Motion to Dismiss for *Forum Non Conveniens*. Yet the existence of discovery disputes between the parties in no way prevented MHI from filing a Motion to Dismiss under the revised version of LSA – C.C.P. art. 123. Whatever discovery issues may have been pending are irrelevant. It was the duty of MHI to timely present its *forum non conveniens* motion. Instead, it continued to litigate discovery under the auspices of the court it now claims is an inconvenient forum for this case. That constitutes a waiver and acquiescence in jurisdiction.

There is a waiver when there is (1) an existing right, benefit or advantage; (2) knowledge of its existence and (3) actual intent to relinquish the right, which can be inferred from conduct. See *Salzstein v. Bekins Van Lines, Inc.*, 993 F.2d 1187 (5th Cir. 1993). MHI knew of its right in June of 1999 to seek dismissal, but filed pleadings and sought judicial relief from the very tribunal it now seeks to escape. MHI has waived *forum non conveniens*.

Authorities supporting the importance of a timely filing of a motion for *forum non conveniens* are abundant. According to the United States Court of Appeals for the Fifth Circuit:

> "We believe . . . that the better rule would be that a defendant must assert a motion to dismiss for *forum non conveniens* within a reasonable time after the facts or circumstances which serve as the basis for the motion have developed and become known or reasonably knowable to the defendant. See, *Wright, Miller & Cooper, Fed. Practice and Procedure*: Jurisdiction §3828, at 291 (2d Ed. 1986); Cf. *Creamer v. Creamer*, 482 A.2d 346, 352 (D.C. App. 1984); *In Re Air Crash Disaster Near New Orleans, La.* 821 F.2d 1147 (5th Cir. 1987).
>
> Further, "[U]ntimeliness . . . should weigh heavily against the granting of the motion to dismiss for *forum non conveniens* because a defendant's dilatoriness promotes and allows the very incurrence of costs and inconveniences the doctrine is meant to relieve." *In Re Air Crash Disaster Near New Orleans,* 821 F.2d 1147, 1165 (5th Cir. 1987), *rev'd on other grounds,* 490 U.S. 122, 109 S. Ct. 1676, 104 L. Ed. 2d 113 (1989).

In the view of the Fifth Circuit, "the moving defendant must submit its motion in a timely manner." 821 F.2d at 1165.

The Court then added guidance on how such timeliness should be evaluated.

> "We believe the time the motion is filed is the appropriate time frame for considering its validity rather than the time of the action's commencement. There are many factors that might bear on the granting or denial of the motion, e.g., discovery, stipulations, admissions, the joinder or dismissal of parties, which frequently develop or occur after the action commences. Thus, the relevant circumstances at the time of the motion is

> filed should serve as the factual backdrop of the Court's decision."
>
> (821 F.2d at 1166)

Where a party litigant in any venue dispute in Louisiana fails to properly challenge venue but exploits the judicial process of the district court, that use constitutes a waiver of the venue issue. (See, *e.g.*, *Danny Weaver Logging v. Norwel Equip. Co.*, 766 So. 2d 701 (La. App. 2nd Cir. 2000), in which employment of the judicial process at the district court level was held to constitute a waiver of the venue issue). Where a Defendant in Louisiana does not take up jurisdictional and venue questions, but appears before the court to ask it to rule on other matters in the case, the venue issue is waived. *Morales v. Falcon*, 167 So. 109 (La. App. 1st Cir. 1936).

It is generally understood that, "A pending motion to transfer will be waived by actions invoking the judicial power of the court in a manner inconsistent with a continuing intention to insist upon the motion." *Gentry v. Tucker*, 891 S.W.2d 766, 768 (Tex. App. 1995). In the case at bar, prior to acquiring the right to pursue any dismissal for *forum non conveniens* in a maritime case under the amended version of LSA – C.C.P. art. 123, MHI and other Defendants filed *forum non conveniens* motions which were properly dismissed by the district court judge. The premature filing of *forum non conveniens* motions by Defendants does not make the dilatory motion to dismiss of November 2, 2000 timely. When it later acquired the right to seek a dismissal under *forum non conveniens* in June of 1999, Mitsubishi took no action, but instead repeatedly invoked the authority of the trial court with respect to discovery.

Under applicable jurisprudence, invoking of the jurisdiction of Civil District Court was wholly inconsistent with any apparent intention to revive the original and meritless *forum non conveniens* motions. Petitioner provides no authority for the view that invocation of jural authority between June 30, 1999 and November 2, 2000 constitutes anything except an acquiescence in the jurisdiction and venue of Civil District Court and a complete waiver of *forum non conveniens*. Petitioner cannot argue that the filing of premature *forum non conveniens* motions in 1994 and 1996 somehow render the November 2, 2000 motion to dismiss timely. Is Petitioner saying that since they filed premature *forum non conveniens* motions before they had a right to do so, that once they acquired the right to seek dismissal in June of 1999, any further delay is of no consequence?

Petitioner cannot rely on the original exceptions; they had to file anew, but waited an unconscionable amount of time to do so and, in the interim, repeatedly invoked the authority of the Court. Citing prematurely filed exceptions which had no legal basis at the time they were filed is of no moment in considering whether a subsequent motion was filed in a timely manner. The previously filed, improper motions do not in any way operate to suspend the time in which to assert a *forum non conveniens* motion.

III. LSA – C.C.P. ART. 123, AS AMENDED, IS UNCONSTITUTIONAL

(A) The Issue Of Constitutionality Was Properly Placed Before The Trial Court.

Petitioner, MHI, has placed the constitutionality of LSA – C.C.P. art. 123 squarely at issue by contending that

the statute had retroactive application. Retroactivity cannot be addressed outside of a constitutional context. It is a constitutional issue. Unfortunately, we cannot know how the Court may have reasoned on the constitutional issue because it failed to provide written reasons for judgment. On January 9, 2001, Plaintiffs filed their Motion for Rehearing on Constitutional Grounds, citing the retroactive application of art. 123 as a wrongful taking and denial of access to Courts, under Louisiana Constitution, Article I, Sections 2, 3 and 4 and the 7th and 14th Amendments to the United States Constitution. The constitutional complaint was, therefore, specifically pleaded by Plaintiffs and placed before the trial court prior to any appeal.

On February 8, 2001, the trial court took two actions: (1) it signed the judgment granting the motion to dismiss of MHI, and (2) denied Plaintiffs' motion for rehearing on constitutional grounds. Thereafter, Plaintiffs appealed, citing, *inter alia*, error in the trial court for failure to acknowledge constitutional deficiencies in the retroactive application of art. 123, as amended. Plaintiffs/Respondents specifically submitted an order to the trial court on a rule to show cause, which would have given the parties an opportunity prior to appeal to thoroughly brief this issue and present detailed oral argument to the trial court. Unfortunately, the trial court denied the motion without explanation, depriving Plaintiffs of the chance to show the court that its ruling violated Plaintiffs' constitutional rights.

(B) Retroactive Application Is Unconstitutional

Petitioner suggests that the retroactive application of LSA – C.C.P. art. 123 does not divest Plaintiffs/ Respondents of any accrued right because Plaintiffs can proceed in another forum. But (1) Petitioner does not show that Plaintiffs can, in fact, proceed in another forum, and (2) even if it were shown that this case could be prosecuted elsewhere in its totality, under the Louisiana Constitution and the laws of the State of Louisiana, Plaintiffs/Respondents have a right to proceed on their cause of action through the Louisiana courts. Louisiana Constitution, Art. 1, §2, §22.

Louisiana Constitution, Art. 1 §22 says: "All courts shall be open, and every person shall have an adequate remedy by due process of law and justice administered without denial, partiality or unreasonable delay, for injury to him in his person, property, reputation or other rights." At the commencement of this matter, therefore, under Art. 1, §22, Plaintiffs/Respondents had a substantive right to access the Louisiana courts as mandated by the state constitution.

The Louisiana Constitution protects the property rights of persons, and provides for due process of law in that regard. Article 1, §2 of the state constitution provides: "No person shall be deprived of life, liberty or property without due process of law. Similarly, the Fifth Amendment of the Constitution of the United States declares in the due process clause that: "[N]o person shall . . . be deprived of life, liberty or property without due process of law."

When Plaintiffs/Respondents acquired their cause of action, they had a vested right and under the Louisiana

Constitution, art. 1 §22; they had the right to pursue that cause of action in the Louisiana courts. At the time of the accident and of the filing of suit, no legal obstacle existed in terms of the principle of *forum non conveniens* which would bar Plaintiffs/Respondents from prosecuting their cause of action in Civil District Court and they did, in fact, exercise that right over a period of six years.

According to Professor A. N. Yiannopoulos, "Retroactive application of new legislation is constitutionally permissible only if it does not result in impairment of the obligation of contracts or in divestiture of vested rights." A. N. Yiannopoulos, *Louisiana Civil Law Treatise*, §10 3d Ed. (1991), p. 20. This is further explained in Yiannapoulous, *Louisiana Civil Law System* §40 (1977). There he notes: "As early as 1855, the Louisiana Supreme Court declared in *Municipality No. 1 v. Wheeler*, 10 La. Ann. 745 (1855), that 'retrospective laws in civil matters do not violate the Constitution unless they need to divest vested rights or to impair the obligation of contracts.'"

Comment (c) is as follows:

> "According to a well-settled rule of statutory interpretation, procedural and interpretative laws apply both prospectively and retroactively unless they violate vested rights or obligations of contracts. See *Ardoin v. Hartford Acc. & Indemnity Co.*, 360 So. 2d 1331 (La. 1978); *Barron v. State Dept. of Public Safety*, 397 So. 2d 29 (La. App. 2d Cir. 1981), *writ denied*, 401 So. 2d 1188." See also, La. Act of 1978, No. 728, §6. "But no provision may be applied to divest already vested rights or to impair the obligation of contracts."

If we turn from historical and jurisprudential authorities to recent pronouncements of Louisiana courts in this

area, we find guidance on how to treat attempts to apply laws retroactively so as to dissolve vested legal rights. Today, as before, the retroactive application of new legislation to vested rights and cases pending in which such vested rights are operative is constitutionally proscribed.

Providing some enlightenment on this point is *Bourgeois v. A.P. Green Industries, Inc.*, 783 So. 2d 1251 (La. 2001), handed down by the Louisiana Supreme Court on April 3, 2001. In *Bourgeois*, Plaintiffs were shipbuilders whose lawsuit, on the day filed, contained a claim for medical monitoring under LSA – C.C. art. 2315. On January 23, 1996, Plaintiffs in *Bourgeois* filed suit for medical monitoring. After the filing, the Louisiana legislature passed Act No. 989, effective July 9, 1999 (three years later) eliminating medical monitoring as a compensable item of damage. The act was inscribed as "interpretive" and further, it stated in Section 3 that, "The provisions of this Act shall be applicable to all claims existing or actions pending on its effective date and all claims arising or actions filed on or after its effective date." The issue before the Louisiana Supreme Court was whether act No. 989, as applied retroactively to the *Bourgeois* Plaintiffs, comported with the United States and Louisiana Constitutions.

The Louisiana Supreme Court acknowledged that art. 989 was declared by the legislature to be retroactive. However, that could not be the determinative consideration on constitutional review. Even where the legislature expresses its intent to give a law retroactive effect, that law may not be applied retroactively if doing so would operate to disturb vested rights.

In deciding for the Plaintiffs, the Court reasoned as follows:

The legislature's power to enact retroactive laws is limited by the Due Process and Contract Clauses of the Federal and State Constitutions. U.S. Const. amend. XIV, §1; U.S. Const. art. I, §10[1]; La. Const. art. I, §2; La. Const. art. 1, §23; See also *Segura*, 93-1271 at p. 19-20, 630 So. 2d at 728, and cases cited therein. Plaintiffs contend retroactive application of Act 989 to their claims would contravene due process guarantees by divesting them of their vested rights in their causes of action which accrued prior to the effective date of the Act. We agree.

When a party acquires a right to assert a cause of action prior to a change in the law, that right is a vested property right which is protected by the guarantee of due process. *Walls v. American Optical Corp.*, 98-0455, p. 8 (La. 9/8/99), 740 So. 2d 1262, 1268. See also *Cole*, 599 So. 2d at 1063; *Crier v. Whitecloud*, 496 So. 2d 305, 308 (La. 1986); *Faucheaux v. Alton Ochsner Medical Found. Hosp. & Clinic*, 470 So. 2d 878, 878-79 (La. 1985); *Lott*, 370 So. 2d at 524; *Burmaster v. Gravit Drainage Dist. No. 2*, 366 So. 2d 1381, 1387 (La. 1978). Thus, a cause of action, once accrued, cannot be divested by subsequent legislation. See e.g. *Faucheaux*, 470 So. 2d at 879 ("The statutes enacted after the acquisition of such a vested property right . . . cannot be retroactively applied so as to divest the plaintiff of his vested right in his cause of action because such a retroactive application would contravene the due process guaranties."); *Terrebonne v. South Lafourche Tidal Control Levee Dist.*, 445 So. 2d 1221, 1224 (La. 1984) ("This vested right could not be impaired by subsequent legislation. The Legislature simply cannot take away an existing cause of action based upon substantive rights

which had clearly been granted by legislation during the preceding session and had become vested on the effective date of the legislation."); *Favrot v. Parish of East Baton Rouge*, 34 La. Ann. 491 (La. 1882) ("Plaintiff cannot be deprived of his [vested] right by mere legislative action."). Under Louisiana law, a cause of action accrues when a party has the right to sue. *Falgout v. Dealers Truck Equip. Co.*, 98-3150, p. 12 (La. 10/19/99), 748 So. 2d 399, 407 ("When a party acquires a right, either to sue for a cause of action or to defend himself against one, that right becomes a vested property right and is protected by the due process guarantees."); *Prejean v. Dixie Lloyds Ins. Co.*, 94-2979, p. 3 (La. 9/15/95), 660 So. 2d 836, 837 ("In Louisiana, a cause of action accrues when a party has a right to sue."); *Cole*, 599 So. 2d at 1063 n.15 ("Under Louisiana law, a cause of action accrues when the party has the right to sue."). We must therefore determine whether plaintiffs had an accrued cause of action, i.e., the right to sue, prior to the effective date of Act 989.

Because a cause of action for medical monitoring of asymptomatic plaintiffs existed prior to the effective date of Act 989, plaintiffs have a vested right to assert their causes of action for medical monitoring if those rights accrued prior to July 9, 1999. A cause of action, for purposes of the peremptory exception, "means the operative facts which give rise to the plaintiff's right to judicially assert the action against the defendant." *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*, 616 So. 2d 1234, 1238 (La. 1993).

The Louisiana Supreme Court, therefore, found that Plaintiffs had a vested property right in their accrued

causes of action which could not constitutionally be divested by Act 989. The decision of the trial court declaring Act 989 unconstitutional as applied to Plaintiffs' claims was, therefore, affirmed. The legislative dictum that Act No. 989 was applicable to "all claims existing or actions pending on its effective date" did nothing in the eyes of the Louisiana Supreme Court to cure the constitutional defect.

The *Bourgeois* case is plainly on all fours with the case at bar. Coincidentally, year 1999 saw the passage of both acts, No. 989 as well as the act which concerns this case, No. 536. Defendants sought to apply both acts retroactively to defeat extant, accrued rights of Plaintiffs whose suit had been in litigation for years. The facts are virtually indistinguishable. In the case at bar, Plaintiffs/Respondents acquired vested rights at the time their decedents lost their lives. As the Louisiana Supreme Court observed in *Walls v. American Optical Corp.*, 740 So. 2d 1262 (La. 1999):

> [I]n order for the plaintiffs in this case to succeed in their argument that the amendment operates retroactively, they must have acquired a vested right in the course of action prior to the statute's effective date. A negligence cause of action will only arise upon the happening of a wrongful act and the existence of an injury resulting in legally cognizable damages.

That is, the cause of action is coterminous with the injury. As the Supreme Court noted in *Walls, supra*, Plaintiffs' injury in a wrongful death action occurs when the victim dies. That is when the cause of action accrues, for that is when Plaintiffs first have a right to sue upon a loss. A cause of action accrues when a suit may first be legally

instituted upon it. *Rogues v. Continental Casualty Co.*, 135 So. 51 (Ct. App. Orl. 1931).

Similar logic is found in *Lovette v. Security Industrial Ins. Co.*, 361 So. 2d 1348 (La. App. 3d Cir. 1978):

> A cause of action does not "accrue" until suit may be legally instituted upon it, that is, when it becomes immediately enforceable. *Grice v. Aetna Casualty and Surety Company*, 353 So. 2d 401 (La. App. 4th Cir. 1977), reversed on other grounds, 359 So. 2d 1288 (La. 1978), rendered June 19, 1978; *Rogues v. Continental Casualty Co.*, 17 La. App. 465, 135 So. 51 (La. App. Orl. 1931). Webster's Third New International Dictionary (1961 ed.) defines the term "accrue" in pertinent part as:
>
> "to come into existence as an enforceable claim: vest as a right (a cause of action has accrued when the right to sue has become vested)."

Thus, Plaintiffs/Respondents in the case at bar acquired a vested right in the cause of action in negligence on the day the *M/V MARIKA* went down and their decedents perished. But the "cause of action" is at the same time a right to bring legal action in the courts of the state of Louisiana as provided for in Louisiana Constitution article 1 §22. No right could be more substantive than the right to bring a legal action in court. When the M/V MARIKA sank, Plaintiffs/Respondents immediately acquired vested rights – rights which the trial court ignored in applying the amendments to LSA – C.C.P. art. 123 retroactively to deprive Plaintiffs of their chosen forum.

Further, if in *Bourgeois* the Louisiana Supreme Court struck down as unconstitutional a new law expressly

stamped by the legislature as applying to present and pending actions, *a fortiori*, in the situation of a statute not so designated as applying to pending cases (Act. 536 of 1999), it is self-evident that as applied to Plaintiffs with pre-existing vested rights, those rights are protected by constitutional guarantees and are immune to legislative tampering.

When the M/V MARIKA sank, Plaintiffs/Respondents acquired a cause of action under federal and Louisiana laws which they are entitled to pursue under Louisiana's Constitution in Louisiana's courts. That is a foundational, substantive, civil right which vested at the time of the loss. Plaintiffs/Respondents have been diligently exercising that particular civil right for seven years. To enact a statute in the midst of that litigation which cuts off that right of access to court, a right which these litigants have enjoyed for seven years, is not a matter of mere "procedure," as Petitioner would have it; it is a matter of substance, it touches the heart of Plaintiffs'/Respondents' civil remedy and deprivation of that right after the fact is a violation of elementary due process. It is little comfort to the banished in exile to say that there are several lands to which he or she might go. Nor does the fact that he or she might go there render this plight merely a matter of "procedure." The United States Fifth Circuit Court of Appeals recognized in *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983) that right of access to the courts is a substantive right and that interference which deprives wrongful death Plaintiffs of that substantive right is a denial of due process.

Petitioner does not demonstrate in its brief that the right to pursue an acquired cause of action in Louisiana is a merely "procedural" right. Nor does the fact that *forum*

non conveniens is a procedural remedy imply that it may be utilized in Louisiana retroactively to cases pending in litigation in which the Plaintiffs have been exercising acquired substantive causes of action for seven years. It is respectfully submitted that the retroactive application of a "procedural" statute cannot be carried out where to do so would deprive Plaintiffs of a substantive right to proceed in suit in Louisiana. *Ryland v. Shapiro, supra.*

IV. PETITIONER HAS FAILED TO CONSIDER THE AGE AND HISTORY OF THIS CASE

A motion to dismiss for *forum non conveniens* is a preliminary consideration to be addressed at the threshold of litigation. By granting meritorious *forum non conveniens* motions, courts spare the parties the needless cost of litigation in a remote tribunal. But, where a substantial portion of the litigation has already been conducted, however, the motion to dismiss on grounds of *forum non conveniens* has far less significance. As Wright, Miller & Cooper have remarked, " . . . if the litigation has progressed significantly . . . a defendant's belated assertion that the forum is not convenient is likely to be viewed dimly by the court." Wright, Miller & Cooper, *Jurisdiction*, §3828.

In the present matter, the enormous record of ten volumes speaks for itself. Plaintiffs/Respondents spent more than $8,000 just to produce this record for review by the appellate court. Plainly, a lot of water has passed under the bridge, making a transfer at this juncture illogical. Defendant/Petitioner has enjoyed the benefits of the American system of jurisprudence and court approved discovery for seven full years, and has performed and

participated in extensive discovery. It is well established that the amount of discovery is an important factor to be weighed in determining whether a case should be dismissed for *forum non conveniens*. *Delgado v. Shell*, 890 F. Supp. 1324 (S.D. Texas, 1995). Among the depositions taken thus far are: (1) Paul Francis Daniels, 490 pages; (2) Christos Nomikos; (3) Avondale Industries, Inc.; (4) The Salvage Association, Ltd.; (5) George Gyftakis, 8 vol. video deposition; and (6) Thomas Hidder, Sanwa Bank, Chicago, Illinois.

Most of the massive written discovery and liability depositions have been taken. Only the damages need to be assessed via Plaintiffs' depositions, plus the deposition of MHI itself. This deposition will be taken in Japan. It will be a necessary inconvenience for all of the parties except MHI. Plaintiffs have offered to defray the costs to Defendants of taking numerous depositions in the Philippines. Considering the vast amount of discovery already carried out, a transfer to any foreign tribunal now would be senseless. A court should dismiss on the basis of *forum non conveniens* only where trial in the United States would be unjust or oppressive, not merely inconvenient for Defendants. *Complaint of Maritima Aragua, S.A. v. M/T Trade Resolve*, 823 F. Supp. 143 (S.D.N.Y. 1993). Given the fact that MHI is in Japan, if this case were transferred, say, to Greece or the Philippines, it is not clear why these venues would be any less "unjust and oppressive" than the present situs where the parties have litigated for seven years.

Petitioner cannot deny that this matter has been in Civil District Court for seven years. Nor can they deny that it is well-recognized that "if the litigation has progressed significantly . . . a defendant's belated assertion that the forum is not convenient is likely to be dimly

viewed by the Court." Wright, Miller, Cooper, *Jurisdiction*, §3828. A great deal of discovery, both in written and testimonial form, has already been completed. After six years of litigation, the Legislature amended art. 123 in June of 1999 to allow for *forum non conveniens* dismissal in maritime cases. Instead of moving for dismissal in 1999, MHI continued to pursue discovery issues and even seek sanctions against Plaintiffs/Respondents at the trial court level. Now, after invoking the authority of the district court to issue orders, including sanctions against Plaintiffs, over a 16 month period, in addition to several years of litigation already undertaken, MHI turns around and seeks a dismissal based on *forum non conveniens*. But this maneuver cannot succeed; it simply comes too late. Petitioner cannot cite a single legal precedent from any jurisdiction that stands for the proposition that where a case has been lodged in a court for seven years and Defendant has had a right to seek dismissal for nearly a year and a half but does not act on it, that the motion to dismiss filed as an afterthought should be granted. There is no authority for the granting of such a motion.

V. PETITIONER HAS IGNORED THE FACT THAT DISCOVERY THROUGH THE COURTS OF ANY OTHER NATION WILL REQUIRE TRAVEL

There is additional discovery needed in this case which will require travel by the parties. But Petitioner does not explain under what scenario extensive travel could be eliminated or even reduced. Travel would not be eliminated if this suit were lodged in Canada. Foreign witnesses would still need to be deposed. The same is true of all other proposed forum nations. In international

litigation there is always going to be travel in order to perform discovery. The question is whether the travel costs attendant upon completion of the litigation in the United States, when compared with the travel costs if the litigation is lodged in some other nation, is greater and somehow fundamentally unfair to Petitioner. Petitioner fails to show that keeping the case in Louisiana would, in fact, necessitate more travel for the parties than if the case were situated in the Philippines or any other country. *Forum non conveniens* cannot be granted on the basis of Petitioner's self-serving speculation. Thus far, depositions have been taken in the United States and in Greece. Additional depositions need to be taken in the United States, Canada, Greece, the Philippines and Japan. There is no evidence that removal of this matter outside the United States will make completion of these depositions any less time consuming or more economical for the parties.

VI. CONCLUSION

Petitioner has failed to meet its burden of showing the existence of an adequate, available alternative forum that would accept this litigation. Without the requisite proof that such a forum exists and would accept the litigation, a motion on *forum non conveniens* cannot be granted. In addition to the fact that this litigation was pending for some seven years prior to the amendment of LSA – C.C.P. art. 123, Petitioner waited some sixteen additional months after the amendment to move for dismissal.

During this entire period of time, Petitioner availed itself of the jurisdiction and remedies afforded by the very

court from which it now seeks escape. Respondents respectfully submit that Petitioner has waived its right to assert a motion to dismiss based upon *forum non conveniens*.

Where a significant amount of the litigation has already been undertaken by the parties, there can be no showing of judicial economy or convenience to the parties such that it would be feasible to dismiss and re-file an action in an alternative forum. Most of the liability depositions have been taken and, for the most part, only damages depositions remain to be taken. Considering the age and posture of this matter, nothing can be gained by a transfer to any of the suggested *fora*.

Respondents, therefore, respectfully urge this Honorable Court to deny Petitioner's Petition for a Writ of Certiorari.

Respectfully Submitted,

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